THE JEFF. DAVIS PIRACY CASES.

TRIAL

OF

WILLIAM SMITH

FOR

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AS ONE OF THE CREW OF THE CONFEDERATE PRIVATEER,

THE JEFF. DAVIS.

PHILADELPHIA:
KING & BAIRD, PRINTERS, No. 607 SANSOM STREET,
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WILLIAM SMITH

FOR

PIRACY,

AS ONE OF THE CREW OF THE CONFEDERATE PRIVATEER, THE JEFF DAVIS.

BEFORE JUDGES GRIER AND CADWALADER,

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF PENNSYLVANIA,

HELD AT PHILADELPHIA, IN OCTOBER, 1861.

BY D. F. MURPHY,

OF THE PHILADELPHIA BAR.

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OF

WILLIAM SMITH,

FOR

PIRACY,

In the Circuit Court of the United States, for the Eastern District of Pennsylvania.

Reported by D. F. MURPHY, of the Philadelphia Bar.

TUESDAY, *October* 22, 1861.

In the Circuit Court of the United States, for the Eastern District of Pennsylvania.

JUDGES GRIER AND CADWALADER.

Counsel for the United States.	*Counsel for the Prisoner.*
J. HUBLEY ASHTON, ESQ., Assistant District Attor'y.	JOHN P. O'NEILL, ESQ.,
GEORGE H. EARLE, ESQ.,	N. HARRISON, ESQ.,
HON. WILLIAM D. KELLEY.	GEORGE M. WHARTON, ESQ.

MR. ASHTON. I move your Honors for the arraignment of William Smith, who is charged in Bill of Indictment (Circuit Court, No. 88, October Sessions,) with the crime of piracy.

JUDGE GRIER. Is William Smith present?

MR. ASHTON. Yes, sir.

JUDGE GRIER. Very well. Let him be arraigned.

The prisoner stepped forward to the Bar, and the Clerk of the Court read to him the Bill of Indictment, as follows:

In the District Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit. Of August Sessions, in the year one thousand eight hundred and sixty-one.

Eastern District of Pennsylvania, *ss.*

The GRAND INQUEST of the United States of America inquiring within and for the Eastern District of Pennsylvania, in the Third Circuit, on their oaths and affirmations respectively, do present, that William Smith, late of the said district, mariner, on the sixth day of July, in the year of our Lord one thousand eight hundred and sixty-one, upon the high seas, out of the jurisdiction of any particular State within the admiralty and maritime jurisdiction of the said United States of America, and within the jurisdiction of this Court, did with force and arms, piratically, feloniously and violently set upon, board, break and enter a certain vessel, to wit, a schooner called the *Enchantress*, the same being then and there owned in whole or in part by a citizen or citizens of the United States of America whose name or names are to the Inquest aforesaid unknown, and did then and there, in and on board of the said schooner called the *Enchantress*, in and upon one John Devereux, then and there being a mariner, and then and there being one of the ship's company of the said schooner called the *Enchantress*, and then and there master and commander thereof, and in and upon Charles W. Page; John Devereux, Junior; Joseph Taylor; Antoine, a Portuguese; Peter, a German; and Jacob Garrick, each then and there being a mariner and one of the ship's company of the said schooner called the *Enchantress*, piratically, feloniously and violently make an assault, and them did then and there, in and on board of the said schooner called the *Enchantress*, upon the high seas aforesaid, out of the jurisdiction of any particular State, and within the jurisdiction of this Court, pirati-

cally, feloniously and violently put in bodily fear and danger of their lives, and the said schooner called the *Enchantress*, and the tackle, apparel and furniture thereof, of the value of three thousand dollars, together with seventy-five sacks of corn, one hundred barrels of mackerel, one hundred and seventy grind stones, fifty boxes of candles, twenty-three thousand feet of white pine boards, two hundred covered hams, thirty tierces of lard, fifty barrels of clear pork, two hundred quarter boxes of soap, two hundred and forty half boxes of candles, and one package of glassware, of the value of ten thousand dollars, of the goods, chattels and personal property of certain persons whose names are to the Inquest aforesaid unknown, the said last mentioned goods, chattels and merchandize being then and there, in and on board of the said schooner called the *Enchantress*, and being then and there the lading thereof, and the said schooner called the *Enchantress*, and the tackle, apparel and furniture thereof, and the said goods, chattels and personal property in and on board of said schooner called the *Enchantress*, then and there upon the high seas aforesaid, out of the jurisdiction of any particular State and within the jurisdiction of this Court, being under the care and custody, and in the possession of the said John Devereux; Charles W. Page; John Devereux, Junior; Antoine, a Portuguese; Peter, a German; and Jacob Garrick; and Joseph Taylor; the said William Smith from the care, custody and possession of the said John Dexereux; Charles W. Page; John Devereux, Junior; Joseph Taylor; Antoine, a Portuguese; Peter, a German; and Jacob Garrick; then and there to wit, upon the high seas aforesaid, out of the jurisdiction of any particular State and within the jurisdiction of this Court, piratically, feloniously and by force and violence, and against the will of the mariners aforesaid, did steal, seize, rob, take and run away with; against the form of the statute of the said United States of America in such case made and provided, and against the peace and dignity of the United States.

And the Inquest aforesaid inquiring as aforesaid, upon their respective oaths and affirmations aforesaid, do further present, that the said William Smith, on the sixth day of July, in the year of our Lord one thousand eight hundred and sixty one upon the high seas, out of the jurisdiction of any particular State, within the admiralty and maritime jurisdiction of the said United States of America and within the jurisdiction of this Court, did with force and arms, piratically, feloniously and violently set upon, board, break, and enter a certain American vessel, to wit: a schooner called the *Enchantress*, the same being then and there owned in part by Benjamin Davis, Junior; Richard Plummer; John T. Page; Ezekiel Evans; J. B. Creasy; J. W. Creasy; and E. M. Read, then citizens of the said United States of America, and did then and there in and on board of the said schooner called the *Enchantress*, in and upon one John Devereux, then and there, being a mariner and one of the ship's company of the said schooner called the *Enchantress*, and master and commander thereof, and in and upon divers other persons whose names are to the jurors aforesaid unknown, piratically, feloniously and violently make an assault, and them did then and there in and on board of the said schooner called the *Enchantress* upon the high seas aforesaid out of the jurisdiction of any particular State and within the jurisdiction of this Court, piratically, feloniously and violently put in bodily fear and danger of their lives; and the said schooner called the *Enchantress*, and the tackle, apparel and furniture thereof, of the value of three thousand dollars, of the goods, chattels and personal property of Benjamin Davis, Junior; Richard Plummer; John T. Page; Ezekiel Evans; J. B. Creasy; J. W. Creasy; and E. M. Read, citizens of the United States of America, and seventy-five sacks of corn, one hundred barrels of mackerel, one hundred and seventy grind stones, fifty boxes of candles, twenty-three thousand feet of white pine boards, two hundred covered hams, thirty tierces of lard, fifty barrels of clear pork, two hundred quarter boxes of soap, and package of glassware, of the value of five thousand dollars, of the goods, chattels and personal property of William H. Greeley, the said last mentioned goods, chattels and merchandize being then and there on board of the said schooner called the *Enchantress* and being then and there the lading thereof, and the said schooner called the *Enchantress* and the tackle, apparel, and furniture thereof, and the lading of the said schooner then and there upon the high seas aforesaid, out of the jurisdiction of any particular State, and within the jurisdiction of this Court, being under the care and custody, and in possession of the said John Devereux and the said divers other persons, mariners as aforesaid whose names are to the Inquest aforesaid unknown, the said William Smith from the care, custody, and possession of the said John Devereux and the said divers other persons mariners as aforesaid whose names are to the Inquest aforesaid unknown, then and there, upon the high seas aforesaid, out of the jurisdiction of any particular State, and

within the jurisdiction of this Court, piratically, feloniously and by force and violence and against the will of the said John Devereux, and the said divers other persons, mariners as aforesaid whose names are to the Inquest aforesaid unknown, did steal, seize, rob, take, and run away with, against the form of the statute of the said United States of America, in such case made and provided, and against the peace and dignity of the United States.

And the Inquest aforesaid inquiring aforesaid upon their respective oaths and affirmations aforesaid, do further present, that the said William Smith, on the sixth day of July, in the year of our Lord one thousand eight hundred and sixty-one, on the high seas, out of the jurisdiction of any particular State, within the admiralty and maritime jurisdiction of the said United States of America, and within the jurisdiction of this Court, did with force and arms, piratically, feloniously, and violently set upon, board, break, and enter a certain schooner called the *Enchantress*, the same being then and there owned by certain persons, citizens of the United States of America, to wit: Benjamin Davis, Junior, Richard Plummer, John T. Page, Ezekiel Evans, J. B. Creasy, J. W. Creasy, and E. M. Read, and did then and there, in and upon certain divers persons whose names are to the Inquest aforesaid unknown, the said last mentioned persons, each being then and there a mariner and of the ship's company of the said schooner called the *Enchantress*, piratically, feloniously, and violently made an assault, and them did then and there in and on board of the said schooner called the *Enchantress*, upon the high seas aforesaid, without the jurisdiction of any particular State, and within the jurisdiction of this Court, piratically, feloniously and violently put in bodily fear and danger of their lives, and the said schooner called the *Enchantress*, and the tackle, apparel, and furniture thereof, of the value of three thousand dollars, of the goods, chattels, and personal property of the said Benjamin Davis, Junior, Richard Plummer, John T. Page, Ezekiel Evans, J. B. Creasy, J. W. Creasy, and E. M. Read, and one hundred barrels of mackerel, one hundred and seventy grind stones, and twenty-three thousand feet of white pine boards, of the value of five thousand dollars, of the goods, chattels, and personal property of William H. Greeley, from the said divers persons, mariners as aforesaid, whose names are to the Inquest aforesaid unknown, in their presence and against their will, then and there upon the high seas aforesaid, out of the jurisdiction of any particular State, and within the jurisdiction of this Court, piratically, feloniously, and violently take, seize, rob, steal, and carry away; against the form of the statute of the said United States of America in such case made and provided, and against the peace and dignity of the said United States.

And the Inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations aforesaid, do further present, that the said William Smith, on the sixth day of July, in the year of our Lord one thousand eight hundred and sixty-one, upon the high seas, out of the jurisdiction of any particular State, within the admiralty and maritime jurisdiction of the said United States of America and within the jurisdiction of this Court, did, with force and arms, piratically, feloniously and violently set upon, board, break, and enter a certain vessel, to wit: a schooner called the *Enchantress*, and in and upon one John Devereux, then and there being in and on board of the said schooner called the *Enchantress*, and being a mariner and master and commander of the said schooner called the *Enchantress*, and the said John Devereux, then and there being a citizen of the said United States of America, did then and there piratically, feloniously, and violently make an assault, and him the said John Devereux did then and there upon the high seas aforesaid and out of the jurisdiction of any particular State, and within the jurisdiction of this Court, piratically, feloniously, and violently put in great bodily fear and danger of his life, and the said schooner called the *Enchantress*, and the tackle, apparel, and furniture thereof, of the value of three thousand dollars, and seventy-five sacks of corn, one hundred barrels of mackerel, one hundred and seventy grind stones, fifty boxes of candles, twenty-three thousand feet of white pine boards, two hundred covered hams, thirty tierce of lard, fifty barrels of clear pork, two hundred quarter boxes of soap, two hundred and forty half boxes of candles, and one package of glass ware, of the value of ten thousand dollars, the same being then and there of the lading of the said schooner called the *Enchantress*, of the goods, chattels, and personal property of the said John Devereux, in his presence and against his will did piratically, feloniously, and violently take, seize, rob, steal, and carry away; against the form of the statute of the United States of America in such case made and provided, and against the peace and dignity of the said United States.

And the Inquest aforesaid, inquiring as aforesaid, upon their oaths and affirmations aforesaid, do further present, that the said

William Smith, on the sixth day of July, in the year of our Lord one thousand eight hundred and sixty-one, upon the high seas, out of the jurisdiction of any particular State, within the admiralty and maritime jurisdiction of the United States of America, and within the jurisdiction of this Court, in and upon one John Devereux, then and there being a citizen of the said United States, and he, the said John Devereux, then and there being in and on board of a certain vessel of the United States of America, to wit, a schooner called the *Enchantress*, and the said schooner being then and there on the high seas aforesaid, did piratically, feloniously, and violently make an assault, and him, the said John Devereux did then and there upon the high seas aforesaid, out of the jurisdiction of any particular State, piratically, feloniously, and violently put in bodily fear and danger of his life, and the said schooner called the *Enchantress*, and the tackle, apparel, and furniture thereof, of the value of three thousand dollars, and seventy-five sacks of corn, one hundred barrels of mackerel, one hundred and seventy grind stones, fifty boxes of candles, twenty-three thousand feet of white pine boards, two hundred covered hams, thirty tierces of lard, fifty barrels of clear pork, two hundred quarter boxes of soap, two hundred and forty half boxes of candles, and one package of glass ware, of the value of ten thousand dollars, of the goods, chattels and personal property of the said John Devereux, from the said John Devereux, and in his presence and against his will then and there, on the high seas aforesaid, and out of the jurisdiction of any particular State, and within the jurisdiction of this Court, did piratically, feloniously, and violently seize, rob, steal, take, and carry away; against the form of the statute of the said United States in such case made and provided, and against the peace and dignity of the United States.

And the Inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations aforesaid, do further present, that the said William Smith, on the sixth day of July, in the year of our Lord one thousand eight hundred and sixty-one, upon the high seas, out of the jurisdiction of any particular State, and within the admiralty and maritime jurisdiction of the said United States of America, and within the jurisdiction of this Court, did, with force and arms, piratically, feloniously, and violently set upon, board, break, and enter a certain vessel, being a schooner called the *Enchantress*, then being a vessel belonging to certain persons to the said Inquest unknown, and then and there piratically, feloniously, and violently did assault certain mariners, whose names to the said Inquest are also yet unknown, in the same vessel and in the peace of the said United States then and there being; and then and there, upon the high seas aforesaid, out of the jurisdiction of any particular State, and within the jurisdiction of this Court, piratically, feloniously, and violently the said mariners in and on board of said schooner called the *Enchantress*, then and there being, did put in bodily fear and danger of their lives; and the said schooner called the *Enchantress* and the apparel, tackle, and furniture of the same, of the value of three thousand dollars, together with seventy-five sacks of corn, one hundred barrels of mackerel, and fifty boxes of candles, of the value of five thousand dollars then being in and on board the same vessel, and then and there of the lading thereof, of the goods, chattels, and personal property of certain persons to this Inquest unknown, and then and there upon the high seas aforesaid, out of the jurisdiction of any particular State, and within the jurisdiction of this Court, being under the care and custody and in the possession of the mariners aforesaid, he, the said William Smith, from the care, custody, and possession of the mariners aforesaid, then and there, to wit, upon the high seas afore said, out of the jurisdiction of any particular State, and within the jurisdiction of this Court, piratically, feloniously, and by force and violence, and against the will of the mariners aforesaid, did steal, seize, rob, take and run away with; against the form of the statute of the said United States of America in such case made and provided, and against the peace and dignity of the United States.

And the Inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations aforesaid, do further present, that the Eastern District of Pennsylvania, in the Third Circuit, is the District and Circuit into which the said William Smith was first brought, and in which he was first apprehended for the said offences.

GEO. A. COFFEY,
Attorney for the U. S. for the Eastern District of Penna.

[The indictment was regularly certified from the District to the Circuit Court.]

At the conclusion of the reading of each count of the indictment, the prisoner pleaded "*Not Guilty.*"

The CLERK.—William Smith, how will you be tried?

The PRISONER.—By God and the country.

The CLERK.—God send you a good deliverance.

The jurors' names were then drawn from the box, and finally a jury was obtained composed as follows:

1. Horatio Jones, gentleman, of Reading, Berks Co.
2. Lewis B. Fretz, gentleman, Hatborough, Montgomery Co.
3. William Kinsey, gentleman, Bristol, Bucks Co.
4. Alfred J. White, clerk, Philadelphia.
5. John Franklin, machinist, Philadelphia.
6. John R. Paul, varnisher, Philadelphia.
7. John P. Miller, gentleman, Reading, Berks Co.
8. John Logan, lime dealer, Philadelphia.
9. Joseph Stoney, gentleman, Conshohocken, Montgomery Co.
10. Jonathan Chapman, engineer, Philadelphia.
11. Samuel S. Tomkins, trunk maker, Philadelphia.
12. Simon Mudge, collector, Philadelphia.

The jurors having all been sworn or affirmed, well and truly to try the case, and a true deliverance to make according to the evidence,

Mr. Ashton, opened the case for the United States. He said:

May it please your Honors, Gentlemen of the Jury:—The gravity of this occasion, the the magnitude and interest of the case I am about to present for your consideration, impress me with a deep sense of the responsibility which, in the absence of the learned Attorney for the United States, has devolved upon me.

I had wished, gentlemen, that other lips than mine would have spoken the opening words of the important trials to which you have been summoned. I had hoped, may it please your Honors, that the United States might have been represented here to-day by him whose absence is a subject of sincere regret to us all, and that the cause of government and of law might have been presented and sustained before this high tribunal with the ability and power that he would have brought to the performance of his high duty. But it has been otherwise ordained.

"Our thoughts are ours, their ends none of our own."

I dare not shrink, however much I might desire that this case, and the cases that are to follow it, should be committed to other and worthier guidance,—I dare not shrink, especially at this hour in our country's history, from the task which has been set before me.

The public interest which has been awakened by this trial leads to the belief that there is a deep public wrong to be avenged. The prisoner at the bar is no ordinary defendant. The trials of which this court room is usually the scene, have an interest merely for the accused, and those who are nearly bound to them, whether by the ties of blood or friendship.—The stories of crime or of misfortune which they disclose are forgotten almost as soon as they are told; and there is nothing left, save the lifeless record of the court, to perpetuate the memory of the fact that any human being has paid, with his life or with his liberty, the penalty of a violated law. The determination of the fate of this prisoner, however, involves the determination of questions infinitely more important than whether he shall die or live. The issues of the present session of this court are fraught with consequences which reach far into the future. The verdict which you shall render will leave this room and find its record in the imperishable history of the land. I conjure you, gentlemen, to meet the high requirements of your position with the promptitude and fidelity which your solemn oaths demand, and which your country expects at your hands.

Gentlemen of the jury, the prisoner at the bar, William Smith, is charged in this indictment with the offence—one of the very highest in the black catalogue of crime—known to the laws of nations and to the laws of the United States as that of piracy. The indictment, which is the chart we are to be guided by in this inquiry, contains six counts, as they are technically called, all of them setting forth substantially the same offence, but varying somewhat as to the manner and form in which the offence is charged. The single question which will ultimately be submitted to you for your determination under this indictment, is, whether, on the sixth day of July, in the year of our Lord one thousand eight hundred and sixty-one, the prisoner at the bar did, feloniously and piratically, set upon, board, break and enter a certain American schooner named the *Enchantress*, and did, piratically and feloniously assault her officers and mariners, and did, piratically and feloniously, and by force and violence, steal and carry away the said vessel and the cargo laden on board of her? Such is the question of fact which you are to determine under the law and the evidence, and upon which depends the guilt or innocence of the prisoner at the bar.

The testimony which the Government will present to you in support of the charge contained in the present indictment, is that of eye witnesses of the scene of violence and robbery enacted on the deck of the *Enchantress*. Their story is a simple one; but that you may the better understand the circumstances under which the crime was committed, I will give you a brief narrative of the facts to which the witnesses will testify.

On the first day of last July, the schooner *Enchantress*, under the command of Captain John Devereux set sail from the harbor of Boston. She was an American vessel, sailing from the time of her birth under the flag of the United States, and loaded with a cargo of miscellaneous articles, consigned to parties in St. Jago de Cuba. Her owners are citizens of Massachusetts, resident in Newburyport, where the vessel was built, and was registered, I believe, at the time of her last voyage from Boston. The cargo shipped on board of her was owned by a number of Boston merchants, and among others, by Mr. William H. Greeley, whose name is mentioned in the indictment.

The *Enchantress* left her moorings, as I have said, on the first of July, and put to sea; but upon the second a heavy gale of wind—prophetic, as it would seem, of the misfortune that was in store for her—drove her back to port, and it was not till the third of July that her voyage began. No voyage upon that summer sea was more prosperous than hers, till

the afternoon of the sixth of July. About noon of that day, the lookers-out from the *Enchantress'* deck descried a sail to windward, which they made out in a short time to be that of a square-rigged vessel. She kept bravely on her course, the ship, however, standing toward her so as to cross her bow. A few hours' sail brought the pursuing vessel within a mile of the schooner, when the former hoisted the French flag. The latter immediately ran up the Stars and Stripes to the main rigging. The stranger, still pursuing, came down to our schooner within less than a quarter of a mile, hauled down her studding-sail and brought her to the wind. Soon the order came from the deck of the stranger to heave to, to which Captain DEVEREUX replied, that it was impossible to do so in the present position of the schooner, but that he would run his vessel to windward, and obey the order. The *Enchantress* then crossed her bow and heaved to. It was immediately seen that this imperious stranger was an armed brig, and that upon her deck, amidships, was a long gun surrounded with men, leveled so as to sweep the deck of the *Enchantress*.

As the vessel approached and came round by the port stern of the *Enchantress* to her starboard side, it was observed that the men on board the privateer, for such they knew her then to be, were in the act of preparing this gun for use—ramming home the cartridge. The vessels, in that position, were but a few hundred yards apart. The unsuspecting, feeble merchant craft lay under the frowning batteries of the dark pirate ship. Submission was the only alternative for the Captain of the *Enchantress*. A boat was then lowered from the privateer, and six men, armed to the teeth, leaped into her; a few strokes of the oar brought them to the side of their captive, and as the officer in command of the boat passed up the side of the *Enchantress*, the French flag was taken from the mast-head and the pirate flag of the so-called Confederate States was spread to the breeze. The officer in charge of the boat announced himself to the mate of the *Enchantress*, who met him at the gangway, as the First Lieutenant of the Confederate brig *Jefferson Davis*, and made inquiry for the captain of the schooner. Captain DEVEREUX was standing upon the quarter-deck; the Lieutenant, approaching him, said: "Captain, I will thank you for your papers—you are a prize to the Confederate brig *Jefferson Davis;* get ready to go on board of her." Captain DEVEREUX procured the papers from the cabin and handed them to the boarding officer; the stores being inquired for, the mate of our schooner pointed them out to the Lieutenant, who took them from the vessel and placed them in his boat. The captain, his son and the mate were ordered then to remain behind, while the crew of the schooner were transferred to the privateer. The Lieutenant and two or three of his men remaining in charge of the schooner, the crew, together with the colored cook of the *Enchantress*, who afterwards became the hero of this affair, were next placed in the boat and taken to the *Jeff. Davis*. The boat soon returned, bringing with her this defendant and four others, who came on board of the *Enchantress* and took possession of her. The colored cook, JACOB GARRICK returned with them, and when the Lieutenant inquired why GARRICK had been brought back, the prisoner replied that the captain had so directed, but that the man would bring a thousand dollars when he got him into Charleston. The vessel being now in the possession of her despoilers, the Lieutenant suggested to the prisoner, who acted as the prize-master, to make sail. Captain DEVEREUX and the mate were thereupon ordered to leave the schooner, and, stepping into the boat, they went alongside of the privateer.

They found her heavily armed, and manned by more than a hundred men. Upon the deck were two 12-pounders, and two guns carrying balls of eighteen pounds, together with the long 18-pounder amidships. Her cabin (as the mate of the *Enchantress* will describe it) was hung all over with muskets, cutlasses and boarding weapons. It was now past twilight. The sail of the pirate was first seen about six o'clock on that July evening; it was past eight when the captain of the *Enchantress* stepped upon the deck of the *Jeff. Davis*. The captain and the crew of our schooner are in the clutches of their enemies. The *Enchantress* and her cargo are in the possession of the pirates—this prisoner and his fellows. The scene now changes. The vessels are to part company; the one to proceed on her voyage of plunder, piracy and death, the other to seek a harbor in some Southern port.

Aboard the captured ship there was a heart as brave as CÆSAR'S, one JACOB GARRICK, a poor black man, who was to become, in the hands of Providence the instrument for the safe deliverance of this captured ship, and whose devotion to the right has brought this prisoner to the bar of his country for the punishment he deserves. JACOB GARRICK will tell you the story of the voyage of the *Enchantress* after the 6th of July. He is the solitary witness of what transpired on board the schooner after the capture, and what he saw he will tell you simply but truthfully. On the morning of the 22d of July, the *Enchantress* made the light-house at Cape Hatteras; but about two o'clock in the afternoon of that day, the United States gun-boat *Albatross* came in sight. Gentlemen of the jury, you can picture, better than I can describe it, the scene of consternation and dismay upon the deck of the *Enchantress*, created by the appearance of our national vessel. The men had agreed that if a United States war ship crossed their path they would personate the captain and crew of the schooner, if they found it impossible to escape, and that in the event of capture, they would either burn or scuttle her.

GARRICK, the cook, was ordered to go below, as the *Albatross* came down upon them, but he ran to the galley, prepared and ready

to frustrate the plans of the pirates when the moment should come for him to act. As the gun-boat approached, GARRICK leaped from the vessel's side into the sea, exclaiming as he jumped, "She is a prize of the privateer *Jeff. Davis*, and they are taking us to Charleston."

A boat was sent from the *Albatross* to his relief, and he was taken breathless and exhausted from the water. The *Enchantress* was immediately boarded by officers of the *Albatross*, the prisoner and the rest of the prize crew were soon safely in irons, and the schooner, under the convoy of the man-of-war, on her way to Hampton Roads. The prisoners were thence brought to Philadelphia, and held for trial in this Court.

Such, gentlemen of the jury, is a concise narrative of the incidents of this vessel's capture, and of her release, out of which the present prosecution has arisen. The testimony upon which we ask you for the conviction of this defendant will be given to you from the lips of those who suffered from his conduct, and who were the victims of his cupidity and crime.

Captain DEVEREUX, the captain of the *Enchantress*, is at present absent with the schooner at sea. We have in attendance upon the trial, however, Mr PAGE, who was the mate of the ship when she was taken, and JACOB GARRICK, the brave colored man, to whom is due the credit of the rescue of this vessel, and whose bravery and self-possession, in a very critical hour, have placed it in the power of the officers of the law to bring the prisoner before you and this Court for trial.

The sixth of July was a memorable day in the short and guilty life of the privateer *Jeff. Davis*. On the morning of that day, previously to the assault upon the *Enchantress*, she had fallen in with the Philadelphia brig *John Welsh*. Short work had been made of her. A cannon ball was fired across her bow, which brought the vessel to; in a few minutes the crew and captain of the *Welsh* were prisoners on board of the privateer, and the stolen ship on her way to a Southern port under the charge of a band of pirates, such as those who will be arraigned before you in the progress of the present trials. The captain and the mate of the *John Welsh* were the witnesses of the assault and capture of the *Enchantress* from the deck of the privateer. They will confirm in every particular the testimony of Mr. PAGE and JACOB GARRICK. They will give you a detailed account of the armament of this ship, her strength and power as a vessel of war, fitted and equipped to roam the sea with the flag of a pirate confederacy at her mast head. They will tell you how impossible it would have been for any of these tiny merchant crafts to attempt resistance to her demands. Immediate destruction of the vessels and the instant death of all on board would inevitably have followed the manifestation of the slightest spirit of resistance on the part of Captain DEVEREUX and his crew. His only course was to submit—to abandon his vessel and the property on board to the prisoner and his fellows, trusting that his country would, some day or other, avenge his wrongs and the wrongs of those committed to his charge. That day, gentlemen, has now come. One other matter of fact alone remains to be stated. When Captain DEVEREUX and the mate of the *Enchantress* crossed the railing of the *Davis*, they found on board of her, as I have apprised you, the officers of the brig *Welsh*, which had been taken on the morning of July the 6th. The next day was the Sabbath—the 7th of July. The day was begun on board the privateer by religious service, in the course of which a prayer was offered that "God Almighty might bless JEFFERSON DAVIS, and all others in authority, and throw confusion upon their enemies at the North." The next business was to look out for sails. Men were sent aloft for that purpose, and it was not long before the schooner *S. J. Waring* hove in sight above the horizon. The sails of the privateer were taken in, and she lay like a decoy duck upon the surface of the ocean, knowing full well that the unwary stranger, fancying that she was in distress, would come up within the range of her guns; and so it happened. The *Waring* was taken by the pirate that Sunday morning, and the next day, the 8th of July, a large ship of eight hundred tons, the *Mary Goodell*, crossed the track of the privateer. Twelve marines, armed to the teeth, were detailed to go on board, and quantities of water and stores were taken from her and transferred to the *Davis*. This cruise of the privateer had been a successful and eventful one. Every capture had brought on board of the vessel numerous prisoners, who were becoming a source of anxiety and danger to the privateersmen. They desired, accordingly, and very naturally, to get rid of them. The *Goodell* presented the opportunity and the facility for their discharge; so Captains DEVEREUX and FIFIELD, of the *Enchantress* and the *Welsh*, with their respective mates, Mr. PAGE and Mr. ACKLAND, were ordered to go aboard the *Goodell*; and by that vessel they were taken to Portland, Maine. You have thus, gentlemen of the jury, the story of their capture and of their release.

Permit me now, gentlemen of the jury, and may it please your Honors, to close these opening remarks with a few words touching the legal nature of the crime for which the prisoner stands indicted. I need not say to you that prosecutions for this offence are not often instituted. I do not know of any trial for piracy in this District, except, perhaps, prosecutions for slave-trading, which has been made piracy by statute, since the year 1823—certainly none later than that is reported in the books. That was the case, sirs, of the UNITED STATES *vs.* KESSLER, reported in 1 Baldwin, and tried before the late learned Judge HOPKINSON.

I may premise that piracies are of two kinds:—(1) Those that are such under the laws of nations; and (2) those that are such by the force of statutory enactments. Piracy,

under the first description of it, is defined to be robbery or a forcible depredation on the high seas, without lawful authority, and done *animo furandi*, and in the spirit and intention of universal hostility. It is an offence against the universal law of society—a pirate being deemed, in the public opinion of all times and countries, an enemy of the human race; and, as such, punishable by any nation into whose jurisdiction he may be brought.

The common law of England—the country from whom we derive our legal usages and thoughts—adopted the definition of piracy under the laws of nations, and recognized and punished it as an offence, not against the municipal code, but as against that other great code of laws which regulates and defines the duties and obligations of independent, sovereign communities in their external relations to one another. Before the statute of 28th Henry VIII., ch. 15, piracy was punishable in England only in the Admiralty. That statute changed the jurisdiction, but not the nature of the offence So well defined is this offence under international law, that in the year 1819 an act of Congress was passed making the crime of piracy, "as defined by the laws of nations," a crime against the laws of the United States, and it was held by the Supreme Court that this act was a constitutional exercise of the power of Congress to define and punish that crime. (U. S. *vs.* Smith, 5 Wheaton, 153.) But, gentlemen of the jury, the prisoner at the bar is not indicted under the laws of nations or under the act of 1819.

The present indictment is in part under the Act of Congress of 1820, which makes robbery in or upon any ship, and in or upon any person or thing on board of any ship, piracy, and, as such, punishable by death. This leads me to a brief consideration of the various statutory enactments that exist upon this subject. The Constitution confers upon Congress the power to define and punish that offence. The first act passed in pursuance of this authority, was that of 1790, section 8, which was very unskillfully and obscurely drawn, and led to many questions of jurisdiction, which were determined finally by the Supreme Court of the United States. In consequence of some adjudications of that Court, the act of 1819 was passed, to which I have referred. It was intended to enlarge the jurisdiction of the Courts of the United States beyond the limits assigned to it by judicial constructions of the act of 1790. But it lasted for one year only, and, in 1820, the act under which this indictment is partly drawn, was passed by Congress. Its terms are broad, general and comprehensive, and the evidence in this case will show you, beyond doubt or question, that the defendant is guilty of the crime which it defines.

The Act of Congress of 30th April, 1790, declares, "if any person or persons shall commit upon the high seas or in any river, haven, basin or bay, out of the jurisdiction of any particular State, murder or *robbery*, or any other offence which if committed within the body of a county, would by the laws of the United States be punishable with death; every such offender shall be deemed, taken and adjudged to be a pirate and felon, and being thereof convicted shall suffer death."

The 9th Section of the same Act renders another offence, of a very peculiar character, piracy; and as it will be important in the aspect which the present case may assume under the testimony for the prisoner, I will give you the very words of the Statute:

"If any citizen shall commit any piracy or robbery aforesaid, (such as is mentioned in the 8th sec.,) or any act *of hostility against the United States*, or any citizen thereof upon the high seas, under color of any commission from any foreign prince or State, *or on pretence of authority from any person*, such offender shall, *notwithstanding the pretence of any such authority*, be deemed, adjudged and taken to be a pirate, felon and robber, and on being thereof convicted shall suffer death."

Judge Washington has called attention to the fact, that this Section is copied literally from the English Statute of 11th and 12th Will, 3, c. 7, the history of which is explained by Hawkins. The British Act was aimed at commissions granted to cruisers by James II, after his abdication of the throne. These commissions were regarded as conferring a legal authority to cruise, so as to protect those who acted under them against a charge of piracy. The English Parliament said by this Statute that no authority conferred by the weak and wicked Stuart would protect those who acted under it from the doom of pirates. The American Statue has a direct and immediate application to those of our own citizens who roam and rob on the high seas under commissions granted by a rebel leader. They confer no authority and no protection.

The Act, as I remarked, is not drawn with the clearness and precision that characterize our elder American Statutes. A primary question arose in Palmer's case (3 Wheaton, 610), respecting the extent of the operation of the Statute. The full and literal meaning of the words would seem to indicate that it applied to any person, whether a citizen of the United States or not, who may commit the crime of robbery, murder, or any of the offences mentioned in the Act, on board of any ship or vessel, whether owned in whole or in part by citizens of the United States, or belonging exclusively to the subjects or citizens of a foreign State. In Palmer's case, however, the Supreme Court decided, Chief Justice Marshall delivering its opinion, that the crime of robbery committed by a person on the high seas—whether an American citizen or a foreigner—

on board of any ship or vessel belonging exclusively to subjects of a foreign State, is not piracy within the true intent of the Act, of which I am now speaking In other words, the act of piracy must be committed on board of an American vessel. Whether the defendant is a citizen or not, if the offence was committed on board of a foreign ship he cannot be convicted under this Act of Congress. The case of Palmer was decided in the year 1818.

The question, soon after the decision in this case had been rendered, came before Mr Justice Washington in this Circuit, upon the trial of Howard and others for the crime of confederating and combining with pirates That great and learned Judge, (whose eminent virtues and abilities are commemorated upon the modest tablet which is placed in yonder wall,) had occasion to employ the authority of Palmer's case, on that occasion, and he then said that robbery on the high seas committed on board of a foreign vessel, did not amount to piracy within the true intent and meaning of the 8th Section of the Act of 1790, and that it was not cognizable in the Circuit Court of the United States

The next case, two years later, was that of the United States v. Klintock, reported in 5 Wheaton (144.) The vessel in that case was owned without the United States The same question—whether the national character of the vessel was the criterion of jurisdiction—came up for decision; and the Court again held, (the great Chief Justice speaking for it in his opinion), that if the piracy be committed on board of a foreign vessel by a citizen of the United States, or on board of a vessel belonging to the United States by a foreigner, the offender is to be considered in respect to this subject as belonging to the nation under whose flag he sails The substance of these adjudications, as it has been expressed by Judge Hopkinson in United States v. Kessler, is, that the national character of the offender is nothing; the jurisdiction is decided by the character of the vessel.

Thus stood the decisions, when the Act of March 3rd, 1819, Section 5, to which I have also referred, was passed by Congress. The object of its framers, doubtlessly, was, to avoid the effect of the decisions to which I have just called your attention. The 5th Section of the Act provided, "that if any person *whatsoever*, shall, on the high seas, commit the crime of piracy, *as defined by the law of nations*, such offender shall, upon conviction thereof, be punished with death." The law of nations upon the subject of piracy was thus incorporated into the laws of the United States. Whatever was piracy in the eye of the laws of nations became an offence against the municipal law of this country. The penal law of the United States was thus made to extend beyond their own vessels, and to embrace acts of robbery committed on board of all vessels, whether owned by our own citizens or not—whether sailing under the American flag or under a foreign ensign. One of the definitions of piracy, as it is known to the laws of nations, I have already given to you. A very forcible description of the offence I find, may it please your Honors, in a quaint speech of Sir David Dalrymple, in the case of Green, the notorious pirate, who was tried before the Scotch Court of Admiralty in the year 1705. The case is found in the fourteenth volume of the State Trials.

"A pirate," says Sir David, "is in a perpetual war with every individual, and every State, Christian or infidel. Pirates properly have no country, but by the nature of their guilt, separate themselves, and renounce on this matter, the benefit of all lawful societies. They are worse than ravenous beasts, in as far as their fatal reason gives them a greater faculty and skill to do evil: And whereas such creatures follow the bent of there natures, and that promiscuously pirates extinguish humanity in themselves, and prey upon men only, especially upon traders, who are the most innocent. The crime of piracy is complex and is made up of oppression, robbery and murder committed in places far remote and solitary."

The 5th Section of the Act of 1819, adopting the definition of piracy in the law of nations, expired, however, by its own limitation. Congress, probably, thought it unwise or impolitic to punish robbery committed on board of foreign vessels. Other nations provided punishment for the offence, when committed upon ships sailing under their own flags, and why should the Congress of the United States undertake to do more than make laws for the punishment of the crime when committed on board of American vessels? This was the argument that probably induced Congress to suffer the 5th Section of the Act of 1820 to expire, and to enact in its stead, the Statute of 15th May, 1820, § 3, which is in these words:

"If any person shall, upon the high seas, or in any open roadstead or in any haven, basin or bay, or in any river where the sea ebbs and flows, commit the crime of robbery, in or upon any ship or vessel, or upon any of the ship's company of any ship or vessel, or the lading thereof, such person shall be adjudged to be a pirate; and being thereof convicted before the Circuit Court of the United States for the District into which he shall be brought, or in which he shall be found, shall suffer death." (3 Stat. U. S., 600. Brightley's Digest, 208.)

The effect of this enactment is, as it has been said, to revive the principle which Palmer's case and Klintock's case had established and reaffirmed, namely, that the character of the vessel, and not of the offender, is to determine the jurisdiction of the courts of

the United States. In every prosecution, therefore, under either the 8th Section of the Act of 1790, or the 3d Section of the Act of 1820, it must be shown that the vessel, on board of which the robbery was committed, was an American vessel; and if that appear, the national character of the offender is of no importance—whether a citizen or a foreigner he is subject to the laws of the United States. The two Acts of 1790 and 1820, are not essentially different, in so far as robbery on the high seas is concerned. The former uses the simple word "*robbery*." The other couples with it the words "*in or upon any ship or vessel*." The former makes "*murder*," as well as "robbery," piracy, if the crime is committed on the high seas. The other provides simply and alone for the punishment of "*robbery*" on the sea. While they provide for the punishment of piracy, as defined by the laws of nations, they also establish a STATUTORY PIRACY, in which the offender is *not* regarded or treated as an enemy of the whole human race, and in which the offence need not, of necessity, be committed in the spirit and intention of universal hostility. The piracy in the present case is of the species that I describe. The very reason that writers upon international law treat of piracy, is that it is an offence against the universal law of human society, and not, especially, against the municipal law of any particular State or people. The pirate of the law of nations is an enemy of the human race; his hand is against every man, and every man's hand is against him. He sails under no flag known among nations, and acknowledges allegiance to no prince or State. He plunders from love of gain. His passion is money, and he kills and robs that he may get it. All nations are alike his enemies. He recognizes no neutrals and no friends. The subjects and ships of every people are the victims of his wild and lawless passions.

On the other hand, the peculiar piracy created by our statutes, may be of a very different character. A single act of robbery on the seas may stamp the offender as a pirate under the statutes of the United States. He may have committed but the single robbery; the article stolen may be of almost inappreciable value, and yet this court would have jurisdiction to try and punish him for the offence, as a pirate, in contemplation of the Acts of Congress.

I would have you, gentlemen of the jury, bear in mind, throughout this case, the distinction which I have endeavored to draw between the two species of piracy; and to remember that we charge this prisoner with the guilt of that offence alone which is created by the Acts of Congress.

The gist of the offence is robbery. The place must be either the high seas, or a river or bay where the tide ebbs and flows. The robbery may be in or upon a vessel, or the lading or crew of the vessel. The taking must be, in legal phrase, *animo furandi;* it must be either with force and violence, or by putting the owners or persons in possession of the property in personal fear and bodily danger of their lives. The force or violence applied may be either actual or constructive, as the law books say; all that is necessary in order to make the offence piracy, is that the power of the owner to retain the possession of the property was overcome by the robber, either by actual violence physically applied, or by putting him in such fear as to overpower his will. It is only necessary to prove, in a prosecution for piracy, that the taking was attended with those circumstances of violence or terror which, in common experience, are likely to induce a man unwillingly to part with his money for the safety of his person, property or reputation. The present case will disclose to you the fact that the robbery of this vessel and of her cargo was accomplished both by putting those in possession of her *in fear*, and by the application of actual violence.

Under the very shadow of an armed ship, manned by a hundred men, the guns levelled to sweep her deck, and ready, upon the instant, to send all on board into eternity if the slightest evidence of resistance should be manifested by them, the little *Enchantress* lay on that summer afternoon. It was while she lay in this position that the piracy was consummated. The prisoner came on board, the captain of the pirate crew, and from the possession of the master and his marines, stole the vessel and her cargo. Resistance on their part, as I have said, would have been madness and death. They were not bound to resist force by force. Indeed, if Captain DEVEREUX had ventured to prevent the boarding of his vessel, and death had been the result—the death of himself and of his crew—he would have been, from every moral point of view, a suicide and a murderer. The alternative of submission was adopted, very happily for him, and for the cause of law and justice.

I have thus, gentlemen of the jury, reviewed the facts of the case about to be presented to you—the principles of law that I deem applicable to it, and the testimony which I will offer on behalf of the Government, and upon which the counsel for the United States will ask you for the conviction of the prisoner.

I need hardly remind you that the issue presented for your determination is a very solemn one, involving as it does the life or death of a fellow being.

But independently of this consideration, which affects merely the personal fate of the prisoner, the case which we present will probably involve the practical determination by you of the great question which is now shaking the continent of America to its centre, and finding its everlasting solution on the battle-fields of Virginia and Missouri.

I need scarcely say to you—a jury of Pennsylvania men—that which it will be the duty

of the Court, in a subsequent stage of the cause, to instruct you, that the pretended authority, under which it may be claimed the crimes of the prisoner were committed, cannot avail him before this tribunal, either to justify or excuse them.

I hold before you the Statute Book of the United States, and put my finger upon the law which he has violated. Not a jot or tittle of that law has passed away; and I ask you, if I bring home to him the offence charged in this indictment, to say the truth before your country and your God—to render a verdict of guilty. We acknowledge but one Constitution, whose law is supreme—supreme here as everywhere throughout this land, which it has blessed and honored. The obligations of allegiance to the Government which that Constitution has established, and which it has imposed upon all American citizens, cannot be destroyed or annulled by the conduct or action of any State or any community of States. No other doctrine, I believe, can reach the ear of this Court, or enter the mind of a Pennsylvania jury.

If, however, the evidence which the Government will bring before you shall be inadequate to support the charge which is preferred against the defendant, no one would more willingly than I listen to a verdict of acquittal; and it will be your duty then to say that he is not guilty in the manner and form in which he stands indicted.

Gentlemen of the Jury, my duty in opening to you the case of the Government of the United States has been now fulfilled. The cause is committed into your hands under the guidance and control of the learned Court, and all that I ask in closing these remarks is that full and impartial justice may be done between the Government and the prisoner at the bar.

At the request of the counsel for the defence, the Court ordered that during the examination of any witness, the remaining witnesses should not be present in the Court room. Accommodations were provided for them in the Clerk's office.

Benjamin Davis called and *sworn*, and examined by Mr. Ashton:

Question. Where do you reside?

Answer. In Newburyport.

Q. You are part owner of the schooner Enchantress?

A. I am.

Q. Where was she built?

A. At Newburyport.

Q. In what year?

A. In May, 1858.

Q. Where was she registered?

A. She was enrolled at Newburyport.

Q. Are all her owners citizens of the United States?

A. They are, and of Newburyport, as far as I know.

Q. Who are the owners of the vessel?

A. It would be almost impossible for me to swear to it, because oftentimes bills of sale of that kind of property are held by persons that we know not of. I own, myself, five-sixteenths of the Enchantress.

Q. Have you the evidences of your ownership?

A. I have.

Q. Have you got them here?

A. I have.

Q. Is Mr. Creasy one of the owners?

A. I presume the owners are Messrs. Richard Plummer, John T. Page, Enoch M. Read, J. B. & J. W. Creasy, J. F. and Thomas Atwood, and myself.

Q. Has she always sailed under the flag of the United States?

A. She has, as far as I know. Her papers show it so anyhow?

Q. Where is she now enrolled or registered?

A. She is now registered in the port of New York under a temporary register.

Q. Where was she registered on the sixth day of July, the time of her capture?

A. She has been under register from the port of New York, I think, for nearly two years past.

Q. Who was her captain upon the sixth of July?

A. John Devereux of Newburyport.

Q. Who was her mate?

A. Charles W. Page.

Q. Who were her sailors?

A. I do not know.

Q. What was the value of the schooner?

A. Her cost at the time she was built, three years since, was about $9000.

Q. What do you suppose her value was at the time of her capture?

A. She has been valued in this city since her return, at some five or six thousand dollars.

Q. On what day did she last sail from Boston?

A. She sailed from Boston on the first day of July, as far as I know. I was not present at her sailing; I presume she sailed then, as the captain wrote me on that day that he was about to do so.

Q. The schooner Enchantress is an American vessel?

A. Yes, sir.

No cross-examination.

John L. Priest called and *sworn*, and examined by Mr. Ashton:

Q. Where do you reside, Mr. Priest?

A. In Boston, Massachusetts.

Q. Do you know the schooner Enchantress?

A. I do.

Q. How long have you known her?

A. Since about the 20th of June last, I think, when I chartered her for a voyage from Boston to St. Jago de Cuba and back.

Q. Then the connection which you had with her on the sixth of July was that of her charterer?

A. I was her charterer and shipper of a portion of her cargo.

Q. Do you know what the cargo of the Enchantress was upon the 6th of July?

A. I know some of the articles. I have a general idea of the cargo; I saw part of it loaded.

Q. Would you recognise the bills of lading for that cargo?

A. Yes, sir.

Q. Do you know whether there were on board of her seventy-five sacks of corn?

A. Yes, sir, I shipped them.

Mr. Harrison (to Mr. Ashton) I would rather you should ask the witness what he knows, and put the questions in a less suggestive form.

Mr. Ashton. It is impossible for the witness to remember the contents of all the bills of lading.

Judge Cadwalader. Perhaps he may

Mr. Ashton. (to the witness.) Give us, if you can, the articles of the cargo?

A. I can speak definitely in regard to the shipment of seventy-five sacks of corn. I shipped them myself and saw them put on board myself.

Q. What other things do you remember?

A. There were also about twenty thousand feet of lumber put on the deck of the the vessel—white pine and oak lumber in the form of boards. I saw it shipped myself.

Q. What other things do you recollect?

A. There were also sundry barrels of mackerel, boxes of candles, and barrels of hams.

Q. Do you remember any other thing?

A. My recollection is more positive in regard to those.

Q. Was there any lard on board the vessel?

A. There was.

Q. Any pork?

A. There was.

Q. Was there any soap?

A. There was, I know. I saw most of the bills of lading when they were made out and the freight list also.

Q. Was there any glass ware on board the vessel?

A. I think there was.

Q. Do you remember the names of the shippers of the cargo?

A. I do, of a good portion of the cargo. Messrs. Greeley & Sons, of Boston, shipped quite a quantity of mackerel, boxes of candles, and white pine boards. The firm of Jacobs & Son, of Boston, shipped a quantity of pork. The Boston Sandwich Glass Company shipped a quantity of glass ware.

Q. Do you remember the names of any of the other shippers?

A. No, sir.

Q. Were all these persons whom you have mentioned, citizens of the United States?

A. They were citizens of the United States, merchants doing business in Boston.

Q. About what time was that cargo shipped on board?

A. I think the vessel commenced loading about the 25th of June.

Q. When was her cargo taken on board entirely?

A. I think it was finished on Saturday evening, the 30th of June. I thing she sailed from Boston on Monday, the 2nd of July.

Q. And that cargo was on board of her so far as you know on the 6th of July?

A. I presume that it was. It was on board the second and must have been on board on the sixth.

Mr. Wharton. You did not go with the vessel?

The Witness. I did not go with the vessel. I saw the vessel partly loaded, and was down on the wharf when she completed her loading.

Mr. Ashton. Did you ever see the bills of lading for the articles on board the vessel shipped by Mr. Greeley?

A. I have seen most of the bills of lading, having had the freight list made out from them.

Q. Are these the bills of lading for Mr. Greeley's articles? [Exhibiting to the witness a number of bills of lading.]

A. These are the bills of lading of the goods shipped by Mr. Greeley.

Mr. Wharton. One moment about that. How do you know that, Mr. Priest?

A. I chartered the vessel and made out a freight list of the articles.

Mr. Wharton. I want to know how you know these particular papers?

The Witness. I saw these papers originally in Boston, before Captain Devereux signed them.

Mr. Wharton. Before they were signed?

The Witness. I saw them before and after. I knew that such articles were to be shipped, and saw them.

Mr. Ashton. It is not important.

Mr. Wharton. I do not know that it is important; but the District Attorney seemed to suppose it was important to have these particular papers identified. I do not understand that what the witness says gives any validity to the papers. All that

he says is that he saw them on a prior occasion.

The WITNESS. I presume these are the same.

JUDGE CADWALADER. I do not see that it is very important on either side.

Mr. WHARTON. I do not know that it is. I presume the witness has not that particular knowledge which would justify hose particular papers going in.

Mr. ASHTON. Mr. Priest, the articles you have mentioned, so far as you know, were on board the vessel on the 6th of July, 1861?

The WITNESS. As far as I know, they were.

Q. They were on board of her when the vessel left the port?

A. They were on board when she left Boston

Q. Is Mr. Greeley a resident of Boston?

A. Yes, sir.

Cross-examined by Mr. WHARTON.

Q. To whom was she consigned?

A. To the house of Masperan, Prenard, & Co., of St. Jago de Cuba.

Q. For what purpose was the cargo sent there?

A. For the purpose of sale.

Q. On your account?

A. Part of the goods were on my account. Some of them were sent on freight by these various Boston shippers.

Q. What was her tonnage?

A. I think her tonnage was about one hundred and eighty tons.

Q. Where was she to go, after leaving St. Jago?

A. She was to procure freight, or to be loaded with sugar on my account, and return to Boston or some northern port in the United States.

Q. Have you the charter with you?

A. I gave the charter to Mr. Woodbury the U. S. Commissioner in Boston, and I understood him to say that he had sent it on with the other papers to Philadelphia.

Mr. ASHTON. To whom?

The WITNESS. To Mr. Morton P. Henry. I asked Mr. Woodbury for it when he wished me to come on here as a witness. He told me he did not find it among his papers, and he thought he had sent it on. He did not think it material.

Mr. ASHTON. I have not seen it.

Mr. WHARTON. That has nothing to do with the transaction, I suppose. I presume it must have been some other affair of business. Was it?

The WITNESS. I think it had something to do with the release of the vessel,

Mr. ASHTON. The question of salvage, was it not?

The WITNESS. I think so.

CHARLES W. PAGE called and *sworn*, and examined by Mr. ASHTON.

Q. Where do you reside, Mr. Page?

A. In Newburyport.

Q. Do you know the schooner Enchantress?

A. I do.

Q. What was your connection with that schooner on the 6th of July, 1861?

A. I was first officer of her.

Q. When did she sail from Boston on that voyage?

A. The first day of July.

Q. Who was the captain of the schooner?

A. Captain John Devereux.

Q. Who were the mariners on board the schooner?

A. Joseph Taylor; John Devereux; Antoine, a Portuguese, I do not recollect his last name; Peter, a German, his last name I do not recollect; and Jacob Garrick, a colored man, the cook.

Q. This John Devereux, whom you mention now, was not the captain?

A. The captain's son.

Q. Then the captain was named John Devereux, and one of the mariners was John Devereux, junior?

A. Yes, sir.

Q. When was her cargo taken on board?

A. During the last week in June.

Q. Of what did that cargo consist?

A. A general cargo of provisions.

Q. Did you superintend the taking in of the cargo?

A. I did.

Q Can you enumerate some of the articles that were on board of the schooner, that were taken on board at the time you have mentioned?

A. Codfish, mackerel, ham, candles, crockery ware, hardware.

Q. Do you remember any other articles?

A. I think there was some soap.

Q. Were there any grindstones on board?

A. There were.

Q. Were there any white pine boards?

A. Yes, sir.

Q. Was there any lard?

A There was.

Q. Was there any clear pork?

A. There was pork on bord.

Q. Was there any glass ware?

A. Yes, sir.

Q. Was there any corn?

A. Yes.

R. In what form was that corn? How was it placed on board?

A. In bags, sacks.

Q. Do you recollect the precise quantities of the articles that you have mentioned?

A. I do not.

Q. Do you know who were the owners or shippers of this cargo?

A. I do not.

Q How was this cargo laden? Was some of it on deck or all of it below?

A. All below but the lumber. Most of the lumber was on deck.

Q. For what place did the Enchantress clear?

A. St. Jago, Cuba.

Q. And on what day?

A. I cannot tell you the day she cleared. She sailed on the first of July.

Q. What happened to the vessel on the second of July, if anything?

A. There was a gale of wind on the morning of the second, and she put back.

Q. Was any of her cargo unladen when she put back?

A. No, sir.

Q. When did she sail again?

A. On the third.

Q. What was the position of the vessel upon the 6th of July, at sea? What was her latitude and longitude?

A. On the 6th day of July, at twelve o'clock, her latitude was thirty eight degrees fifty-two minutes north, and her longitude sixty-nine degrees fifteen minutes west.

Q. How far from shore was she?

Judge CADWALADER, (to Mr. ASHTON.) You can fix that by the chart if it becomes important.

Mr. ASHTON, (to the witness.) Do you know the chart of the Enchantress?

A. Yes, sir, I have seen it.

Q. To whom did the chart of the Enchantress belong?

A. I do no know.

Q. Is that the chart of the Enchantress? [Exhibiting it.]

A. Yes, sir.

Q. Now look at that chart and tell us how far this vessel was from the coast on the 6th of July, at twelve o'clock.

Judge CADWALADER. There is no difficulty in supposing that the vessel was on the high seas. That is evident from what he has already sworn to.

Judge GRIER. We take it for granted that she had not run on shore.

The WITNESS, (having measured the distance on the chart by the compass.) She was about two hundred and fifty miles from the shore.

Mr. ASHTON. On the high seas?

A. Yes, sir.

Q. What were the incidents of that day, the 6th of July, on board the schooner Enchantress? Be good enough, if you please, to give deliberately and fully to the Court and Jury the occurrences on board the schooner on that day?

A. On that day things went on as usual on board up to about two o'clock in the afternoon, when we descried a sail to windward. We could just make out that she was a square rigged vessel. We kept on our course. We gradually gained upon her, and we found that she was a square rigged brig. She was standing so as to cross our bow. When within about a mile I should judge, she hoisted the French flag. We hoisted the Stars and Stripes. We still kept on our way thinking she might be a French vessel that wanted to get news from the United States. When within about half a mile, she altered her course and ran towards us. The vessel was hauled to the wind, her studding sails lowered, and we were ordered to heave to.

Q. As a mariner, Mr. Page, state what was the object of this maneuver with the sails?

A. Hauling his vessel to the wind he had to lower his studding sails. To take them back would have retarded his progress.

Q. He ordered you to do what?

A. To heave to. Captain Devereux told him that he could not heave to in the position he was. He said, "I will cross your bow and run to windward, and heave to." We did so, went to windward of him, and hove to. He immediately lowered a boat. The boat came alongside of us with an officer and some six men.

Q. How far was the Enchantress from this vessel at that time?

A. Perhaps some seven or eight times her length; I could not state the exact distance. It was within hailing distance. I stood in the gangway of the Enchantress The officer, when he came over the gangway, said to one of his own men, "Haul down that flag in the main rigging."

Q. That was your flag?

A. Yes, sir.

Q. Did the man obey the order?

A. He did.

Q. The flag was removed?

A. Yes, sir.

Q. Where did those men post themselves when they came on board the Enchantress?

A. The men went all over the vessel, anywhere they chose. The officer went aft to the captain.

Q. Did he ask you for the captain?

A. He asked me where the captain was; I told him he was aft.

Q. Did you hear what he said to the captain?

A. I did.

Mr. WHARTON. Would it not be better to let him tell his whole story himself?

Oftentimes the incidents in regular order may present a different impression from the same incidents brought out by various questions not pursuing the exact order of events.

Judge GRIER. The best way is to let the witness tell his story, and then ask him as to anything he has omitted.

Mr. ASHTON. That is exactly what I wanted. (To the witness.)—Go on with your statement.

The WITNESS. The officer asked our captain where he was from, and where bound, and what was his cargo. The captain told him. He then said, "I will thank you for your papers, captain; you are a prize of the Confederate brig Jeff. Davis; get ready to go on board of her." The officer asked if I was the mate of the vessel. I told him I was. Said he, "Show me where your stores are." I showed him. He took two of his men down into the cabin, and they took out whatever stores they wanted and put them into their boat. They then took the Enchantress' crew (with the exception of Captain Devereux, his son, and myself) into the boat. The lieutenant and three men remained on board the schooner.

Judge CADWALADER. When you say "lieutenant," you mean the boarding officer?

The WITNESS. Yes, sir, the lieutenant of the Jeff. Davis. Three men rowed back to the privateer with all our men except Captain Devereux, his son, and myself. Some half-hour's time elapsed, and they came back to our vessel with the prize crew, five men. The lieutenant then gave Captain Devereux, his son, and myself orders to get ready to go in the boat. We put our things in the boat and got in ourselves, and they rowed us to the brig, and we went on board.

Mr. ASHTON. Now, let me interrupt you at this point, and ask you if the defendant, the prisoner at the bar here, was one of those five men?

A. He was, sir.

Judge GRIER. One of the five who were left in the possession of your vessel? Is that what you mean?

A. Yes, sir; they were left in possession of our vessel.

Mr. ASHTON. Let me ask you another question before you go on. Was any member of the Enchantress' crew brought back in that boat?

A. Yes, sir, Jacob Garrick, the negro cook. He came back in the boat that brought the prize crew on board. The officer asked the prisoner at the bar what they brought him back for. He said the captain would not have him on board the brig, and the prisoner at the bar said, "He will fetch fifteen hundred dollars when we get him into Charleston."

Q. You went on board the brig?

A. Yes, sir.

Q. In whose possession was the Enchantress at that time?

A. The prize crew from the brig.

Q. And there was no member of the Enchantress' crew, except Jacob Garrick on board of her then.

A. None.

Q. Was the cargo on board of the schooner, to which you have referred, in the possession of the defendant and the other four men?

A. It was.

Q. Was any portion of that cargo removed by you or by Captain Devereux, or any of you?

A. There was not.

Q. What did you take with you to the brig?

A. We took our clothes.

Q. The clothes you had on?

A. All our clothes that belonged to us.

Q. Were the charts of the vessel and the instruments of navigation left on board?

A. They would not let us take them.

Q. Who would not let you take them?

A. The prize crew and the officer of the brig said we must leave everything on board in the schooner, the nautical instruments, charts, &c.

Q. When you went on board the brig Jeff. Davis, what was her condition in regard to arms?

A. She carried five guns, two on each side, and—

Q. What was their calibre?

A. I could not swear to their calibre, but I heard some of them say they were two eighteens, two twelve-pounders, and one long eighteen amidships (a pivot gun).

Q. What was the number of her crew?

A. About one hundred men and officers.

Q. Was there any cargo on board of her that you saw?

A. None that I saw.

Q. You have seen men-of-war, Mr. Page; was she manned and equipped as a vessel of war?

A. She was, to the best of my judgment.

Q. Now, to return: when the Enchantress hove to, how many hundred yards was this vessel from her?

A. A very short distance; I cannot state exactly.

Q. Could you, from the deck of the Enchantress, see the brig very plainly or not?

A. We could.

Q. Could you see the men on her?

A. We saw perhaps some twelve or fifteen when she first ordered us to heave to.

Q. You say this gun amidships was a pivot gun: in what position was it?

A. It was pointed at us; and as we went across his bow to go to windward to heave to, he swivelled his gun around—kept it to balance all the time.

Q. Did you see the men about the gun?

A. I did.

Q. What did they seem to be doing?

A. To be ramming home a cartridge.

Q. Were there any arms on board the Enchantress?

A. There was one musket.

Q. Was that all?

A. That was all.

Q. What time did you leave the Enchantress?

A. As near as I could judge, about half-past seven o'clock in the evening.

Q. Was it dark?

A. Just getting dark.

Q. How long did it take you to get to the brig?

A. Some fifteen or twenty minutes. It was about eight o'clock when we got on board the brig.

Q. During the time you were on board the brig, were you down in her cabin?

A. I was.

Q. What did you see there?

A. All sorts and descriptions of arms, all around the cabin, hung up in racks.

Q. Small arms—pistols, and things of that sort?

A. Pistols, cutlasses, rifles.

Q. You have spoken of the men on board her. Were there any marines on board her?

A. There were what they called marines.

Q. Armed with muskets, or not?

A. Sometimes they would be allowed to have muskets, and sometimes they would go without them, on board the vessel.

Q. Where were those marines posted when you went on board the brig?

A. I could not state. It being dark, I did not recognize them.

Q. You, and Captain Devereux, and his son, were on board the Jeff. Davis. Who else?

A. The remainder of the Enchantress' crew.

Q. How long did you remain on board that brig?

A. I was on board her from the evening of the 6th of July until the evening of the 9th.

Q. As a prisoner?

A. As a prisoner.

Q. How happened it that you were released from this imprisonment?

A. They captured a ship called the Mary Goodell on the afternoon of the 9th, and the captain of the brig told us we could get ready to go on board her as he would release us.

Q. Did the captain give any reason for that?

A. He said that the ship was so large that they could not do anything with her; they could not get her into any southern port.

Q. How large was she?

A. A ship, I should judge, of between eight and nine hundred tons. They let all our crew go except two, whom they kept on board the privateer.

Q. Were any other of the prisoners on board the brig released at the same time?

A. There were.

Q. Who were they?

A. Captain Fifield of the brig John Welsh, Thomas Ackland his mate, and a boy that belongs in Philadelphia, who was with Captain Fifield; I do not know his name.

Q. When you went on board the brig did you find these persons there?

H. I did.

Q. As prisoners, or as mariners of the brig?

A. As prisoners taken that morning.

Q. During the three days you were on board the brig, had you an opportunity of knowing something about her conduct?

A. I had.

Q. What did the Captain say, or any body on board the vessel connected with her say was the object of her voyage?

Mr. Wharton. What is that?

Mr. Ashton. I want to know whether anything was said by the officers or persons in control of the vessel as to the object of her voyage?

Mr. Wharton. After this man Smith was on board?

Mr. Ashton. Either before or afterwards.

Mr. Wharton. We object to that.

Mr. Ashton. If your Honors please, we have shown the relation between this prisoner and the persons on board the vessel in the nature of a conspiracy, and I take it that the words of one bind the other.

Judge Grier. So far as they are part of the *res gestæ*, they would, but this is a mere matter of confessions afterwards.

Judge Cadwalader. This is outside of the rule.

Judge Grier. They are found together and acting together, and so far the acts and conduct and words of each one are evidence as part of the *res gestæ*, and they are all bound by them; but I do not see, that mere confessions afterwards could affect them.

Judge Cadwalader. This was after the connection was severed.

Judge GRIER. The connection might not be severed; but the position, the *locus*, was severed.

Mr. ASHTON. Would your Honors' ruling apply to the acts of this vessel?

Judge CADWALADER. All you can want to prove is the character of the vessel, and that you show by her conduct in a specific case. I rather think you have got out all you want in that respect.

Judge GRIER. When you prove that a man knocks you down, it is pretty good proof that he is not a peaceable man. Here you have proven that this brig captured a vessel. You do not want anything else. The conduct of the brig has shown what she is, better than any words anybody could use about it. If the other side can show a defence or justification of it, that is another matter; but, you cannot make it any worse or better by any words they said afterwards.

Mr. ASHTON (to the witness.) Well, Mr. Page, while the two vessels were in the position that you referred to, at the time you left the Enchantress, would it have been possible for the men on board the Enchantress to have resisted?

A. It would not.

Q. Why not?

A. We were laying right under the guns of the Jeff. Davis. They were pointed at us, and if there had been any resistance, they would have blown the vessel out of water, I suppose without a doubt.

Q. You identify this defendant, Smith, as one of the men who came on board the vessel under the circumstances that you have described?

A. I do.

Q. Do you know the value of the cargo on board the schooner at the time of her capture?

A. I do not.

[Mr. ASHTON offered the chart in evidence,]

Cross-examined by Mr. WHARTON.

Q. You have spoken of a French flag that was run up: was that flag pulled down at any time before your capture?

A. The French flag was pulled down and the Confederate run up when the Lieutenant was coming over the gangway, at the time of actual boarding.

Q. At the time of actual boarding, you saw the French flag hauled down and what you call the Confederate flag run up?

A. They said it was the Confederate flag. I never saw it before.

Q. I never saw it, and perhaps the jury never did, either; will you be kind enough to describe the flag that was run up, which you call the Confederate flag?

A. It has eleven stars, a red stripe and a white stripe—"the Stars and Bars" they call it. I shall not be sure about the stripes; but it has eleven stars, and I think the stripes are red and white; there are two stripes.

Q. Do those bars or stripes run across or lengthwise?

A. I cannot say positively.

Q. Are the stars in the centre or in the corner?

A. In one corner.

Q. Did you hear the order given to haul down one flag and run up the other.

A. I did not hear it from my own vessel. I was not on board the brig.

Q. Then the brig lay at some distance?

A. She lay within hailing distance.

Judge CADWALADER. I suppose the communications you gave us in the early part of your testimony were by the trumpet?

The WITNESS. Yes, sir.

Mr. WHARTON. Was the order to haul down one flag and hoist the other, given by the boarding officer or by some one that you do not know?

A. Some one I do not know.

Q. It was not given by the boarding officer that came on board of your vessel?

A. No, sir, he ordered our flag to be hauled down.

Q. You have spoken of him as the Lieutenant; did he give himself that title?

A. He told me that he was Lieutenant and gave me his name.

Q And therefore you got his title from himself?

A. Yes sir.

Q. Was that done when he first came on deck?

A. No, sir, afterwards,—after he had got aft and took the Captain's papers.

Q. Aft on board your vessel?

A. Yes, sir.

Q. Did he say who his Captain was? did he give the name of the Captain of the brig?

A. He did not.

Q. You have mentioned, that when you got on board the brig, she was called the Jeff. Davis; was that her name?

A. She had no name on her. They gave her that name.

Q. You have described a good many things that you saw when you got on board —arms, &c. Did you see, or did they speak of, a commission which they held?

A. Not to my knowledge, any further than when boarding the schooner the officer said "you are a prize to the Confederate brig, Jeff. Davis,"-- nothing further than that.

Q. You have already said that she had

all the appearance of a vessel of war in her equipments, armament, and every thing?

A. She had.

Q. How many days were you on board of her?

A. Three days.

Q. How were you treated?

A. As well as could be expected under the circumstances.

Q. I do not ask what your feelings were, only the actual fact as to your treatment.

A. We were not ill used after going on board.

Q. I have not heard you describe any circumstance of ill usage in your capture. There was nothing that occurred that you have not stated, I presume. Was there no other violence used than what you have already indicated by an officer coming on board with men and directing your surrender, &c.?

A. None other.

Q. In regard to the Enchantress, did you part company with her on the same evening? You mentioned that about 8 o'clock, when it was dusk, you went on board the brig, and then you parted with the Enchantress; and therefore, you have no personal knowledge of the course she took?

A. No, sir.

Q. Can you give us some general idea, without reference particularly to the chart, but with reference to some neighboring island or land, where you were when you were captured on that occasion, whereabouts you were, in what waters?

A. From two hundred to two hundred and fifty miles southeast from Nantucket South shoal.

Q. That was the nearest land?

A. Yes, sir.

Q. Was that in your direct course to St. Jago?

A. Yes, sir. We were steering in a direct course.

Q. You did not remain long enough upon the Enchantress at the time of her capture to know what course she was directed to take? Do you know anything about that?

A. In the bustle of the moment, I did not take any notice of it.

By Mr. Harrison:

Q. Did you ever see the defendant, Smith, until you saw him on board the Enchantress on the 6th of July?

A. I never did.

Q. How long did you have an opportunity of seeing him on that occasion?

A. An hour or more.

Q. Have you seen him before to-day since he has been confined in Moyamensing prison?

A. I have been there and seen him.

Q. How often have you seen him in prison?

A. I have been there twice I think.

Q. Why did you go to see him?

A. I did not go in to see him in particular. I went to see the prison.

Mr. Harrison. I ask why you went to see the prisoner and by whose authority did you go?

The Witness. I went because I wished to go.

Mr. Harrison. Was it a visit entirely of a friendly character that you made to Smith?

A. That was all.

Mr. Ashton. Excuse me. It may be that the witness does not understand your question.

Mr. Harrison. I will try to make him understand it.

Mr. Ashton. He went there by my authority one or twice.

Mr. Harrison. Then I understand you, Mr. Page, that you were sent there or were authorized by the government officers to go to that prison?

The Witness. Yes, sir.

Mr. Harrison. That brings me to the very point to which my interrogatory was addressed: unless you had been directed to the cell where you were told Smith was, if you had met him anywhere else, would you have been able to identify him?

A. I would.

Q. Your recollection of him was sufficient without the visit?

A. Yes, sir.

Q. The object of the visit, then, was not to enable you to identify Smith, or to see whether you could identify him?

A. It was not.

Q. Why did you pay him a second visit?

A. Because I wished to go to the prison and see him, and I went upon authority.

Q. Neither visit had any reference at all to the testimony you expected to give in this case?

A. None whatever.

Q. Why did you go to see Smith?

A. I had no particular reason, but I thought I would like to see them.

Q. Did you go to see all of them?

A. I saw the whole of them.

Q. Do you think you would be able to recognise Lieutenant Postell?

A. Yes, sir. I could recognise him if I met him in the dark, almost.

By a Juror.

Q. In what relation did the defendant stand to the rest of the party that boarded the Enchantress as a prize crew? Was he an associate, or the commander?

A. He was the prize master.

Re-examined by MR. KELLEY:

Q. Had the marines of whom you spoke, any distinctive uniform?

A. They had not.

Q. How did you know they were marines?

A. I was told so on board the vessel.

Q. Was there anything like uniformity of dress on board the vessel?

A. There was not, to my knowledge.

By MR. WHARTON:

Q. You state that Smith was the prize master: do you know whether any instructions were given to him? What was he told to do with his prize?

A. I do not know. If there were any instructions given to him, I suppose it was on board the brig before he left it. I did not hear them.

Q. You said he was the prize master: how did you know that?

A. The lieutenant pointed him out to me and told me his name was Smith, and that he was the prize master, and immediately when he came on deck, he took charge of the vessel and ordered the crew to make sail.

Q. Did you hear at all what Smith was told to do with the vessel?

A. I did not.

Q. You only know that he was the prize master, indicated by the lieutenant as such?

A. Yes, sir.

JACOB GARRICK, called and sworn, and examined by Mr. Ashton.

Q. How old are you?

A. About 25.

Q. Where were you born?

A. In Santa Cruz, Danish West Indies.

Q. What is your business?

A. I generally follow the sea as cook and steward.

Q. How long have you followed the sea?

A. About eight years and a half. I think I went to sea in 1852 or 1853.

Q. What were your duties on board the Enchantress?

A. I was cook and steward.

Q. When did she sail from Boston?

A. On the first of July.

Q. You were on board of her on the 6th of July?

A. Yes, sir.

Q. Tell us what you saw that day?

A. On the 6th of July, about two or three o'clock, we made a sail. I heard them sing out "sail ho." I looked and saw the sail myself. We were going on our course with a pretty fair breeze of wind, this sail still coming on to us. It came on pretty late; I had supper about half past five o'clock. When we came on deck after supper, we saw the sail, having the French flag flying. Some of the men said it was a French vessel. It kept coming along and got pretty near us. I was washing my dishes, and I heard one of the men sing out forward "that's a privateer." I looked over my galley, and I saw they had the French flag set and were ramming home a cartridge. I saw the big gun amidships. She came around, hailed us, and told us to heave to. The captain sung out something to her, and she kept on and came round on the stern. Then I heard them sing out for us to lower away our fore-sail and haul down our jib. The captain did so, and hove our vessel to, and then I saw a boat come to us. Previous to that, when they got on the starboard side of us, they hauled down the French flag, and hauled up the Confederate flag. Then they lowered the boat. The boat came alongside of us, and some of the men got off and spoke to the captain. I took notice of a man with a glazed cap on and a white coat.

Q. How many men came on board?

A. I cannot tell how many men were in the boat. It was a boat's crew. They rowed four oars, I know.

Q. Where was the captain of the Enchantress?

A. Aft, on the quarter deck.

Q. Did these men speak to the captain?

A. Yes, sir, I saw them go and speak to the captain. I could not hear what they said because I was forward.

Q. What did the captain do, if anything, after they had spoken to him?

A. He went down into the cabin.

Q. Did he bring up anything with him?

A. I did not take notice whether he did or not.

Q. What did these men do to the sailors on board the Enchantress?

A. They said "men, get ready to go on board the Jeff. Davis; take all the things belonging to you."

Q. Who said that?

A. I heard that man (Smith) say so.

Q. Was Smith one of those men?

A. Oh, yes, sir.

Q. Did your captain go into the boat?

A. Not at first. They took us on board, and then the boat returned to the Enchantress with the prize crew and took off the captain, and his son, and the mate.

Q. Were you in that boat?

A. Yes, sir.

Q. How near to the Jeff. Davis did you go?

A. I was right alongside of her. Once I stood up and looked over the rail.

Q. Where did the men of the Enchantress go?

A. On board the Jeff. Davis.

Q. Why did you not go?

A. Well, I heard them say "take that colored individual back; you need not pass up his things."

Q. Did they refer to you?

A. Oh, yes. I knew they referred to me then.

Q. How many men got into that boat, then, from the Jeff. Davis?

A. I do not know how many. The prize crew came in with their things, and there were some few more—the steward of the Jeff. Davis, and others.

Q. Was this defendant one of the men?

A. Yes, sir.

Q. One of those that sailed with you in this boat from the Jeff. Davis to the Enchantress?

A. Yes, sir.

Q. Did this defendant go on board the Enchantress when you did?

A. Yes, sir.

Q. When he went on board, where was the captain of the Enchantress?

A. He was aft on the starboard side, sitting down.

Q. Who was with him?

A. The captain's son and the mate.

Q. How long was this defendant on the Enchantress before the order was given to the captain to leave?

A. I suppose about ten or fifteen minutes at the longest.

Q. Who ordered the captain to leave?

A. The officer who came from the Jeff. Davis told the captain to stay, and his son and mate. The others went on the boat to the Jeff. Davis. Then the boat returned back and took them aboard.

Q. Was the captain ordered to get into the boat then?

A. Yes, when they were ready.

Q. What was done?

A. The captain went in, and took his things with him.

Q. Who went with him?

A. His son and the mate.

Q. Where were you then?

A. I was left on board the Enchantress.

Q. When the brig hove to, how far was she from the Enchantress?

A. I suppose she was about as far as from here down to the corner there, [meaning the distance diagonally across the court room from one corner to the opposite one.]

Q. Did you see her plainly?

A. Oh, yes, sir.

Q. How long after the captain left, did they make sail?

A. As soon as the captain left, the boat returned back and brought the prize crew some tobacco from the Jeff. Davis, and in a few minutes the Enchantress set sail. It was dark.

Q. Who took command of her?

A. Smith. I suppose he did, because he ordered me to get some supper for him.

Q. Did you get the supper?

A. Yes, sir, I got him some tea.

Q. During the time you were on board the Enchantress under Smith, what was your position? what did you do?

A. I was cooking, the same as before.

Q. How long were you on board the Enchantress then?

A. Sixteen days from the day we were captured.

Q. When were you recaptured?

A. On the 22d of July.

Q. Now tell us what occurred on the 22d of July?

A. Soon after dinner I took my dishes to the galley and washed them. In going back to the cabin with the dishes, I saw Smith have a spy glass. I looked under the lee of the mainsail and I saw a vessel coming that I thought was a steamer. I took my dishes down and came back and took another look, and I saw it was a steamer. The steamer was coming right in our direction. Smith said to the men to take the flying jib off to bend; but they sang out to Smith, "you had better not bend that jib now, because if they see us making sail they will think something and come at us." He said, "go ahead and bend it." Then they started out to bend it, and he said "never mind, you can let it lie." Then I heard him say, "one of you men go up and sheer over that topsail sheet." A man went up to do it, and was there a considerable while. Then Lane said to me, "you can go in the forecastle, steward; and if they should come and overhaul us, and your name is called, you can answer." I said I would rather stay in the galley. I went in the galley and watched the steamer coming. When the steamer saw us tack ship, she hauled right up for us. I kept looking through from one galley door to the other according as we would go about. We went about three or four times. The schooner was going pretty fast. I still kept looking to see how near the steamer was getting to us. I heard one of the men say, "she has hoisted her flag," and they went out and hoisted our flag. The steamer hoisted the American flag, and we hoisted our American flag. The steamer kept coming on. I heard them say, "it is a man-of-war." When the steamer got pretty close to us, I heard a hail "what schooner is that?" The reply was, "the Enchantress." "Where bound to?" "St. Jago de Cuba." As soon as that was said, I jumped out of my galley and jumped overboard.

Q. How far was the steamer from you?

A. About across this room, — within speaking distance.

Q. What did you do when you jumped into the water?

A. I sang out "a captured vessel of the privateer Jeff. Davis, and they are taking her into Charleston." I sang it out so that they could hear me on board the steamer.

Q. How did you get out of the water?

A. The steamer's boat picked me up.

Q. What was done then?

A. First, when the boat picked me up, they took me on board the schooner, and then they took the prize crew off the schooner and took me on board the steamer along with them.

Q. Did they take this defendant out of the schooner?

A. Yes, sir.

Q. Where did they put him?

A. They took him on board and stood him up on deck, and then they took him below.

Q. When the steamer was coming down to you, did you hear this defendant or any of these men make arrangements about what they would do?

A. Oh yes, they were arranging themselves to take the names of the Enchantress' crew.

Q. How do you mean?

A. One was to act in place of the captain with his name; another in the place of the mate with his name; and so on through the crew.

Q. Was there not one less of these men?

A. Yes, they were one short.

Q. What about that?

A. I heard that they were to say that man was washed overboard.

Q. To whom was all that to be said?

A. If any of the United States armed vessels should speak them, they were to do this, of course, to get clear.

Q. What was the name of this steamer?

A. The Albatross.

Q. Do you know her commander?

A. Captain Prentiss.

Q. What did they do with the schooner when they boarded her?

A. The first lieutenant boarded her and took the prize crew off her, and made them row him to his own vessel, leaving his boat's crew on board to take charge of the Enchantress.

Q. What did they do with the schooner?

A. A prize crew was put on board from the steamer, with me along as cook. Then we made sail in her and steered to Hampton Roads. The steamer came up to us. threw us a hawser, and towed us to Hampton Roads.

Q. How did you get to Philadelphia?

A. After being there seven or eight days the steamer came again, took us in tow, and brought us up here.

Q. And you have been here ever since?

A. Yes, sir.

Q. Are you a man of family?

A. No, sir. I have a brother in New York.

Q. What flag had the Enchantress flying when she was captured?

A. The American flag.

Q. What flag did she carry after she was captured?

A. The American flag. She had no other on board.

Q. This prisoner, then, kept the American flag still on the vessel?

A. Yes, sir, all the flags on board were American.

Q. Do you know where you were at the time the Albatross took you?

A. I heard them say we were near Cape Hatteras on the coast of North Carolina.

Q. Who did you hear say that?

A. The man Bradford, I think.

Q. How long after you saw the Hatteras light, were you captured by the Albatross?

A. We saw the lighthouse in the morning about six o'clock, and we were taken by the Albatross about three o'clock in the afternoon.

Q. Do you know in what direction the Enchantress sailed after the prize crew, the defendant and the other four men, were put on board her?

A. I heard them say to steer the course southwest, they were going to Savannah; but after they were a few days out they said they would not go to Savannah but to Charleston. By going to an inlet called Bulls', they said they could take a steamboat and be towed up to Charleston.

Q. How long did it take you to get from the place where you were taken by the Albatross, to Hampton Roads?

A. Soon after we were taken, a gale of wind came up, and it took a long time to tow us with the wind ahead. We should have been in the next day if it were not for that, but the following day we were in at Hampton Roads.

Q. Did the Albatross take you in the direction the Enchantress was sailing at that time, or in the opposite direction?

A. She turned back.

Q. Then you went north after the recapture?

A. Yes sir.

Q. You spoke of a place called Bulls, do you know where it is?

A. I do not, but I heard them say it was twenty-five miles from Charleston.

Q. Who told you so?

A. I heard them say so on board among themselves.

Q. Did these persons keep the log after the Enchantress was taken?

A. No, sir, they did not keep any log.

Q. Was the log book on board?

A. Yes, there were two logs.

Cross-examined by Mr. WHARTON.

Q. You were cook originally, and you continued in your ordinary pursuits?

A. Yes, sir, I cooked for them.

Q. You held the office of cook under every change of administration?

A. I cooked for four captains.

Q. Did you hear the instructions that were given, or did you hear these men say where they were told to take the Enchantress?

A I never heard them say where they were told to take her. I heard them say where they were going to take her.

Q. Where was that?

A. They started to take her to Savannah. After they were a few days out, they altered and said they would take her to Bull's so as to get her up to Charleston.

Q. Then they were to take her either to Savannah or Charleston as far as you understood?

A. Yes, sir.

Q. You did not hear Smith or any of them say where they were told to take her by the persons who put them on board?

A. No, sir, but I heard from the Jeff. Davis, several give messages to friends in Savannah.

Q. Who was the Captain of the Jeff Davis?

A. I do not know.

Q. Do you know his name?

A. No, sir.

Q. You think you were off Cape Hatteras when the Albatross came along?

A. Yes, sir.

Q. And you were steering southwest?

A. Steering to Charleston. I do not know the course we were steering that day.

Q. The Albatross took you in tow and brought you into Hampton Roads?

A. Yes, sir.

Q. Did you come to anchor in Hampton Roads?

A. Yes, sir.

Q. Smith was there?

A. He was on board the gun boat.

By Mr. ASHTON.

Q Did you see Smith at Hampton Roads?

A. No, sir. I did not see any of them at Hampton Roads.

Q. Then Smith was kept on board the Albatross, and you were with the prize crew of the Albatross?

A. Yes, sir.

Mr. WHARTON. The Albatross towed you to Hampton Roads, and she and the Enchantress arrived there together, and stayed there about a week you say?

A. Yes, sir.

Mr. WHARTON. Did the Albatross lay with you at Hampton Roads?

A. No, sir. She was out cruising around. She went to relieve a gun boat somewhere up the river.

Mr. WHARTON. But what was done with Smith?

A. I do not know.

Q. Do you know what they did with Smith and the other men of the original prize crew?

A. I will say I did not see Smith nor any of them after they were taken on board the Albatross when they were captured, until I saw them here.

Q. Did you not see them at all at Hampton Roads?

A. No, sir.

Q. I suppose the Albatross came to anchor in Hampton Roads?

A. Yes, sir; she lay some two days there.

Mr. HARRISON. How far from the shore?

A. I suppose as far as from here to the corner; I cannot tell exactly.

Mr. WHARTON. A very short distance?

A. Yes, sir.

Q. What was the nearest place?

A. We lay right abreast of Fortress Monroe.

Q. How near were you to the fort?

A. I suppose we were about four hundred or five hundred yards from Fortress Monroe.

Q. Do you know that the crew from the Albatross were sent ashore there?

A. I do not know any more than that I saw boats from the Albatross go ashore. Boats were going backwards and forwards from the vessel to the wharf.

Mr. HARRISON. For two days?

A. Whilst they lay there. They lay there a couple of days.

Mr. WHARTON. Then the Albatross went off on a cruise?

A. She went up the river.

Q. What river?

A. I do not know the names of the rivers there.

Mr. ASHTON, Did you see all this.

A. I saw when they hauled across and went up the river.

Mr. WHARTON. How long was she gone?

A. I cannot tell rightly now.

Mr. WHARTON. You seem to have been very accurate in your recollection of other dates and I thought you might recollect this.

The WITNESS. Well, she was away about five days. She came up in the night.

Q. Did she take you in tow again?

A. She came up in the night, and next day she took us in tow.

Q. And then brought you to Philadelphia?

A. Yes, sir.

Q. You say you did not see Smith till you arrived here?

A. No, sir.

Q. On board what vessel did you then see him?

A. I saw him here in the Court.

Q. You did not see him on board the Albatross?

A. No, sir.

Q. Who were the persons that went from the Albatross to the fortress in boats and back again?

A. I do not know who they were.

The Court adjourned till to-morrow.

WEDNESDAY, *October* 23, 1861.

JOHN C. FIFIELD called and sworn, and examined by Mr. ASHTON.

Question. Where do you reside?

Answer. In New Jersey.

Q. What is your business?

A. Seafaring business.

Q. How long have you been following the sea?

A. About sixteen years.

Q. Where have you sailed from?

A. I have sailed from the port of Boston and from this port.

Q. From what port did you sail last?

A. Philadelphia.

Q. In what vessel?

A. The John Welsh.

Q. As captain of that brig?

A. Yes, sir.

Q. Was she a Philadelphia built brig?

A. She was built in Gloucester, but owned in Philadelphia.

Q. Where were you bound when you sailed from Philadelphia last in that brig?

A. To Trinidad de Cuba.

Q. Did you reach Trinidad de Cuba?

A. Yes, sir.

Q. Did you sail back from Trinidad de Cuba?

A. I sailed for Falmouth, England, with a cargo of sugar from Trinidad.

Mr. WHARTON. I presume the object is to bring this gentleman in some way into contact with the defendant.

Mr. ASHTON. That is all.

Mr. WHARTON. The mode of doing that, I suggest, is not important to us.

Mr. ASHTON (to the witness.) Have you seen WILLIAM SMITH, the prisoner at the bar, before?

A. Yes, sir.

Q. Where did you see him first?

A. I first saw him on board the John Welsh.

Q. Where did you see him next?

A. On board the Jeff. Davis, or what was said to be the Jeff. Davis.

Q. How did you happen to be on board the Jeff. Davis?

A. I was captured by her.

Q. What was the date of the capture?

A. The 6th of July.

Q. At what time of the day did it occur?

A. I should think about nine o'clock in the morning.

Q. How did you happen to get on board the Jeff. Davis?

A. I was taken in their boat.

Q. And on board the Jeff. Davis you saw for the second time William Smith?

A. Yes, sir.

Q. What was his capacity on board that vessel?

A. I was told that he was prize-master.

Q. How long were you on board the Jeff. Davis?

A. I was captured on Saturday, about nine o'clock, and was on board until the Tuesday evening following.

Q. How many days did you see William Smith, the prisoner, on board the Jeff. Davis?

A. I only saw him till that Saturday afternoon. I suppose he left about six or seven o'clock; I cannot state exactly when.

Q. You recognize him as the person whom you saw on board that vessel?

A. That is the man [pointing to the prisoner.]

Q. Did you see the assault upon the schooner Enchantress?

A. No, sir; I was below. When the Jeff. Davis came within about three miles as I supposed of the Enchantress, we were all ordered below.

Q. At what time in the day did you first see the sail of the Enchantress?

A. I cannot say when, precisely. I saw it probably by three o'clock; at what time they saw her, I do not know; there were some three or four sails at the time; I do not think I saw her more than two or three hours before she was brought to.

Q. How long after the chase began, were you ordered below?

A. When we came within about three miles of her, all the prisoners on board were ordered below.

Q. How long did you remain below?

A. Until she was boarded by the boat from the Jeff. Davis. After she was boarded, we came on deck.

Q. Did you see the flag that she had flying during the chase?

A. Yes; we saw that out of a small window. When she came alongside, she had the American flag.

Q. But I mean the flag of the Jeff. Davis?

A. We saw that out of the skylight; we watched when they hauled the French flag down, and hoisted what I suppose is called the Confederate flag.

Q. At what time did they hoist the Confederate flag?

A. Not until the vessel was probably not more than a quarter of a mile off; I should think she was less than a quarter of a mile distant; she was alongside, close under the guns.

Q. Did you see William Smith leave the Jeff. Davis for the purpose of going on board the Enchantress?

A. Yes, sir; I saw him leave as prize-master; that is what was said.

Q. Then you were on deck at that time?

A. Yes, sir.

Q. How many left with him?

A. That I could not say, as there was in the boat a number of the other crew. I understood that he went as prize-master to take charge of the schooner.

Q. Then you saw him go on board the Enchantress?

A. I saw him leave the brig. I did not notice particularly his going on board the Enchantress.

Q. How long after William Smith left did the Jeff. Davis make sail?

A. I do not think she made sail that night at all; it was dark. After he left, the boat that took him and the prize crew on board the Enchantress, brought to the Jeff. Davis Captain Devereux, his son, and mate, I think; three or four of them; and it was then dark.

Q. Did you see the Enchantress make sail?

A. Yes, sir; I saw her make sail, and stand away; but I think the Davis lay still all that night; it was squally and rainy.

Q. William Smith did not return with the boat that brought Captain Devereux and the mate to the Jeff. Davis?

A. No, sir; I did not see him on board again while I was there.

Q. Did you see any preparations that were being made on the Jeff. Davis?

A. Yes, sir; the guns were all got ready, the ports were unlashed, the waist guns were pointed, and the swivel was shotted and manned, and all ready to fire into her if it was needful in order to capture her.

Q. What do you mean by the swivel?

A. The long gun amidships, which they could turn all the way round. They brought it to bear on the Enchantress, before she came within hailing distance, and kept it bearing on her all the while. As soon as the vessel went around in any direction, they swivelled the gun around so as to bear on the vessel.

Q. Did you see them load that gun?

A. No, but I think it was kept loaded all the time.

Q. How many guns did the Jeff. Davis carry?

A. She had four waist guns and this swivel.

Q. Do you know the calibre of the guns?

A. I do not.

Q. Do you know whether those guns were loaded at the time of the assault on the Enchantress?

A. I was told they were loaded.

Q. Told by whom?

A. By the purser and assistant surgeon.

Q. During the time William Smith was on board the vessel?

A. Yes, sir.

Q. Did you see any other arms on board that ship, with the exception of those you have mentioned?

A. Yes, sir; I saw muskets, double barreled guns, pistols, cutlasses, boarding-pikes. I should think there were about fifty muskets with bayonets; I cannot say how many double barreled guns, but quite a number.

Q. How many cutlasses?

A. I cannot say.

Q. Where were they kept?

A. In the cabin.

Q. Were you down in the cabin often?

A. Yes, sir, I slept in the cabin.

Q. Do you know whether the muskets and double barreled guns you speak of, were kept loaded?

A. Yes, sir, they were said to be loaded.

Q. Who said so?

A. The captain of the marines. The double barreled guns were loaded with buck shot, and the others with balls, I was told.

Q. How many men were there on board the Jeff. Davis during this cruise—I mean of her company?

A. It was said there were seventy. I never had any means of ascertaining the number, but I should think there were about that many; that is, when I was captured; nine were taken out and put on board my vessel; that reduced their number, and made it sixty-one.

Q. Were there persons on board who were termed marines?

A. Yes, sir.

Q. What were their duties on board that ship?

A. They kept guard over the cabin at night. I cannot say what their duty was otherwise.

Q. Were they armed during the day?

A. No, sir; but during the night they were.

Q. What arms had they?

A. They had the muskets then, and the captain of marines generally had a pistol or two when he was on deck himself.

Q. Did these men wear any distinctive uniform?

A. No, sir; there was no particular uniform on board the vessel; they were dressed just as it happened.

Q. Was there a magazine on board the ship?

A. Yes, sir.

Q. Did you see any powder and balls?

A. I saw the powder as it was passed out of the magazine.

Q. Where was it passed?

A. On deck, to load the guns. Before they captured the Mary Goodell, preparations were made for a severe attack on her, and at that time a number of small arms were carried on deck; that was the only time I saw the magazine opened.

Q. Did you hear any conversation between William Smith and the officers of the Jeff. Davis, at the time he left for the purpose of going on board the Enchantress?

A. No, sir; I saw him in conversation with them, but I heard nothing of what was said.

Q. You said that William Smith went on board your ship: in what capacity?

A. He seemed to have charge of a lot of men who came to take provisions out of the vessel.

Q. You said that you were ordered to go down below when the assault was made on the Enchantress?

A. We were all ordered to go below, or lie down on deck, except the ordinary crew of a merchant vessel, say four or five men. They were about the vessel, but the rest were ordered to lie down on deck or go below.

Q. Was there any peculiarity that you noticed about the rigging of this vessel, the Jeff. Davis?

A. Her sails were mostly hemp sails; that was one peculiarity which led me to suppose she was a foreign vessel.

Q. Explain that.

A. American vessels mostly have cotton sails, by which you can tell them very distinctly wherever you see them at sea; they are much whiter than hemp sails; all European vessels have hemp sails; and you can usually tell whether a vessel at sea is an American or foreign vessel by the sails, when you see nothing else.

Q. Then it is to some extent a badge of nationality?

A. You very seldom see a United States vessel, particularly of that class, with hemp sails. The Jeff. Davis had, and she was rigged very much like a foreign vessel; they asked me if the French flag and hemp sails had deceived me, and I told them yes.

Q. Who asked you that?

A. The first lieutenant, Postell. He said they tried to get her as much like a French vessel as possible, before they left, for the sake of deceiving our ships.

Q. At what distance would one on the sea observe the guns of this brig?

A. I did not observe them until I was within half a mile of her, as they were kept covered up. Thinking she was a merchant vessel, we did not suspect anything until we were right underneath her guns; and the others told me it was the same with them.

Q. How were the guns kept covered up?

A. They had a large canvass covering that they had painted and thrown over the long swivel gun. The waist guns were also covered up with canvass.

Q. Was the canvass painted black?

A. I cannot say what color it was painted.

Q. What was the color of the vessel?

A. She was painted black.

Q. When was this covering removed?

A. It was removed about the time they wanted to fire the guns.

Q Did they fire a gun when they captured your ship?

A. Yes, sir.

Q. From what gun, and in what direction, was it fired?

A. From the swivel gun ——.

Mr. Wharton. (To the witness) Not at the ship, but across the bow, to bring you to, I suppose.

The Witness. We were running to the eastward; and the gun was fired so as to make the ball cross alongside of us.

Mr. Ashton. Was it not a blank cartridge?

A. No, sir, a ball.

Q. Were Captain Devereux and the mate of the Enchantress released with you?

A. Yes, sir, on the ship Mary Goodell.

Q. What reason did the captain of the Jeff. Davis give for the release of Captain Devereux, and Mr. Page, and the rest of you?

A. He did not give me any himself; I had it from the other officers. The ship drew too much water to allow her to be got into a southern port, and her cargo was not of much value, being mostly lumber.

Q. What ship?

A. The Mary Goodell.

Q. Was she a large vessel?

A. I should think she was about seven hundred tons and drew eighteen feet of water. They then had twenty-one prisoners on board the Jeff. Davis, and they did not want any more then. Besides, they wanted to reserve their crew for more valuable prizes.

Q. Did they visit the Mary Goodell?

A. Yes, sir.

Q. How many went on board her?

A. A large boat load—I cannot say what number; some marines with cutlasses and muskets.

Mr. Harrison. That was after the defendant had left. I do not know that that is evidence in this case.

Judge Grier. This is only part of the history of the conduct of this vessel, to show what her character was. So far as that is concerned, it may properly be given in evidence.

Question by Mr. Ashton. Were any of the contents of the Mary Goodell removed from her?

Judge Grier. That seems to be getting beyond the transaction.

Mr. Harrison. I presume we are not to be affected by any unlawful acts committed by others.

Mr. Ashton. I will not press that. Mr. Fifield how did you get into Philadelphia?

The Witness. The ship Mary Goodell went to Portland, and from there I came to Philadelphia by the usual route.

Cross-examined by Mr. Wharton.

Q. You have been master of a vessel, and know somewhat of the usages of the sea?

A. Yes, sir, I have been long enough on the sea to know something of it.

Q. Firing a shot across the bow of a vessel is a sort of invitation to her to stop, and not to go on; is it not ordinarily so understood?

A. Yes, sir, a blank cartridge is generally so understood.

Mr. Wharton. A blank cartridge does not pass in front of the bow.

Judge Cadwalader. The witness is right; the first shot is a blank.

The Witness. The first is a blank cartridge, next a ball.

Mr. Wharton. But I mean to say the firing across the bow is of course not a firing at the vessel. It is an intimation, a very distinct one, to the vessel, that she is not to go ahead.

The Witness. That is the intimation I took. I expected that the next shot would come into me.

Mr. Wharton. You have spoken of certain preparations made on the deck of the vessel in regard to the pivot gun, which you say was turned round so as to follow the Enchantress. I understood you to say that when she was about three miles off you were ordered below.

A. Yes, sir.

Q. When you were below, you could hardly see the preparations on deck, could you?

A. We could see them at work on the swivel. The cabin was not very low; it was half under deck, and half on deck.

Q. I wanted to understand whether you could actually see what was going on. You say you could?

A. Yes, sir. The cabin was half under and half on deck, so that you could stand and see what was going on.

Q. You have mentioned already several officers who were on board the Jeff. Davis. Just tell us, if you please, who the officers were, what were their particular ranks, how many officers there were, as near as you can? Give us the arrangement of the ship's company.

A. Coxsetter was the commander; Postell was the first lieutenant.

Q. Did you ever hear Coxsetter called captain?

A. I do not know that I ever did. Perhaps I did. I do not recollect. He was considered captain. Whether he was called "Captain Coxsetter" or not, I cannot now say.

Q. Give us now the other officers?

A. Postell was first lieutenant, and there was a man named Stewart second lieutenant; I think that was the capacity they held there. Babcock was the purser and assistant surgeon; I think that was what they called him.

Q. Did he hold both posts?

A. So I was told.

Q. Then there was a surgeon, I take it for granted, besides the assistant?

A. Yes, sir, but his name I do not know.

Q. Can you give us either the names or titles of any other officers on board?

A. I cannot.

Q. You have spoken of marines,—who were their officers?

A. There was a captain of marines.

Q. Did they seem to be equipped differently from the rest of the ship's company?

A. Only when they were on watch at night. Then they stood guard over the cabin with muskets, and the captain of marines had a pistol when he was on deck.

Q. Did they not seem to be a distinct body of men from the rest of the crew?

A. I should think probably they were. I do not know what duty the marines did outside of that. They cleaned the guns and the small arms they had in the cabin.

Q. You have said that Smith, the pris-

oner, was appointed or designated as prize master,—just tell us if you please all that passed on that subject.

A. I know nothing of what passed, except that before the papers were fixed I saw the captain and the purser in conversation with Smith. There may have been some others with them. That was a little while before he left.

Q. What "papers" do you refer to?

A. I saw a letter handed to him.

Q. By whom?

A. I think Dr. Babcock, the purser.

Q. A sealed letter, or an open letter?

A. I do not know anything about that.

Q. Did you not hear any of the language used?

A. Nothing whatever.

Q. You said in your examination in chief that he was appointed prize master?

A. I was told he was appointed prize master.

Q. By whom were you told?

A. I think by the purser, Dr. Babcock.

Q. Did he tell you so after Smith had left, or at the time he left?

A. After he left, I heard different persons on board the Jeff. Davis speak about him and his feelings. They wondered how he must feel, and spoke of the risks he had to run, &c.

Q. And they spoke of him on those occasions as having been designated as prize master?

A. Yes, sir, as having charge of the vessel.

Q. Then what you saw of the actual occurrence of his being appointed prize master was merely that he took a letter and was pointed out and took some men with him, I presume?

A. Yes, sir.

Q. Did he select the men, or were they selected for him?

A. I do not know who selected the men.

Q. This you also saw from the cabin?

A. We were on deck then.

Q. Then it was after you came up on deck, and after the Enchantress was boarded?

A. Yes, sir; as soon as she was boarded we were allowed to go on deck.

Q. Did you hear any instructions given to him at all?

A. I did not.

Q. Did you know what instructions were given?

A. I knew nothing of them.

Q. You do not know where he was to take the Enchantress?

A. No, sir.

Q. You do not know what he was to do with her?

A. No, sir; I know nothing at all about it.

Q. You say you slept in the cabin,—had you as good accommodations as the vessel afforded?

A. I suppose about the same as any one on board. We all slept there together, and the captain of marines slept there. The captain and the purser had state rooms.

Q. But the captain of marines and yourself slept in the cabin?

A. We slept in berths which were put up in the cabin.

Q. What was your treatment generally?

A. We had all we wanted to eat, but mostly out of my own provisions.

Mr. Wharton. But you were allowed to eat your own bread, which is not the case with everybody.

The Witness. Yes, sir, we had all we wanted in that way.

Q. You have stated that you were ordered below, when the vessel came within a few miles of the Enchantress,—at other times, had you not your liberty about the vessel?

A. We had.

By Mr. Harrison.

Q. Was not the shot of which you speak as having been discharged by the Jeff. Davis, discharged at such an angle as to make it impossible for it to take effect upon the John Welsh?

A. I cannot say at what angle the ball was shot. I heard the ball go by, whizzing.

Q. How far ahead of the bow did it pass?

A. I did not see. I heard it, but did not see it.

Q. Are you not sailor enough to know that it passed sufficiently ahead of the bow to make it impossible that it should take effect?

A. It might have hit the spars.

Mr. Wharton. That was the shot at the John Welch,—not at the Enchantress.

The Witness. Yes, sir; I am positive no shot was fired at the Enchantress.

Re-examined by Mr. Ashton.

Q. You have been a sailor for several years?

A. About sixteen years.

Q. You have come across naval vessels of the United States frequently on the sea?

A. Yes, sir.

Q. Did you ever know a vessel of the United States Navy fire first a shot to bring a vessel to?

A. No, sir; nor of any other navy. A blank is always fired first.

Q. Was there any cargo on board the Jeff. Davis?

A. None that I know of. I should think not, as she was very light.

Re-cross-examined by Mr. WHARTON.

Q. Did you ever know a vessel of the United States bring a merchantman to, without firing at all, ball or blank cartridge?

A. I do not know that I ever did.

Q. Then this was a singular instance in the case of the Enchantress, of the Jeff. Davis bringing her to without any firing?

A. Yes, sir. It was because she hove to before there was any occasion to fire; but all the preparations were made. She was so close that it was not necessary to fire a shot to bring her to.

JOHN L. PRIEST recalled, and examined by Mr. ASHTON.

Q. I omitted, yesterday, to ask you one or two questions, that may or may not be important. What was the gross value of the cargo on board the Enchantress, in round numbers? I do not want you to be very particular.

A. I could hardly make an estimate; but I should judge, from the papers I have since seen about the salvage cause, that the cargo cost from seven to eight thousand dollars.

Q. You enumerated, yesterday, a number of articles that were on board: what were those seventy-five sacks of corn worth?

A. About $100, or a little over.

Q. What were those twenty-three thousand feet of white pine boards worth?

A. About $350.

Q. What were those fifty boxes of candles worth?

A. About $6 a box.

Q. Then there were two hundred covered hams; what were they worth?

A. I cannot say exactly, but I should think about eleven cents a pound.

Judge GRIER. It is unnecessary to have the particular value of everything. No doubt they were valuable articles.

Judge CADWALADER. They were articles acquired for the purpose of being sent for sale. Of course, they have value.

Mr. ASHTON. I did not think this testimony was absolutely necessary; but I wished to cover the ground fully.

Judge CADWALADER. I think you have enough.

Mr. ASHTON (to the witness). Wm. H. Greeley, of whom you spoke, was a member of the firm of Greeley & Son, of Boston?

The WITNESS. Yes, sir.

Q. The goods were shipped in his name?

A. Yes, sir.

THOMAS ACKLAND called and sworn, and examined by Mr. Ashton.

Q. Where do you live?

A. In Philadelphia.

Q. What is your business?

A. I go to sea, and have followed it for twenty-one years for a living.

Q. In what vessel did you last sail?

A. The John Welsh.

Q. What was your capacity on board the John Welsh?

A. First officer.

Q. Were you on board her at the time of her capture by the Jeff. Davis?

A. I was.

Q. Were you taken to the Jeff. Davis?

A. I was.

Q. Were you on board the Jeff. Davis at the time of the assault upon the Enchantress?

A. I was.

Q. What time in the day were you captured?

A. As near as I could tell you, it was between eight and nine o'clock in the morning.

Q. On what day and at what time of the day, was the assault upon the Enchantress made?

A. About seven o'clock in the evening. They got on board the brig about seven o'clock in the evening.

Q. Then you were on board the Jeff. Davis at the time of the assault and capture of the Enchantress?

A. Yes, sir.

Q. Be good enough to tell us briefly, and in your own way, what you saw on that day, the 6th of July?

The WITNESS. What time do you wish me to commence from; the time of our capture, or that of the Enchantress?

Mr. ASHTON. From the time you first saw the Enchantress.

A. The man at the mast head made a sail about two o'clock in the afternoon, and of course she drew nigher to her until about four o'clock, somewhere toward evening; I cannot state the time exactly. About seven o'clock they got on board of us. Between these times, two o'clock in the afternoon and seven o'clock in the evening, they took a boat from the Jeff. Davis, which was the John Welsh's boat, and went on board the Enchantress, with the first lieutenant, Mr. Postell. I believe they had arms with them.

Q. How many men?

A. I cannot say; but probably from eight to a dozen.

Q. How did they get the John Welsh's boat?

A. They took it from the John Welsh.

Q. Was it a large boat?

A. A pretty good sized boat.

Q. A larger boat than any of the boats of the Jeff. Davis, or smaller?

A. Larger.

Q. How do you know they were armed?

A. I believe they used to conceal the arms about them, because I saw them take them from different places about them. The second lieutenant showed me where he concealed his arms underneath his stocking, in his shoe. His knife was in a place made for it between his pants and drawers, by the calf of his leg. I saw him take the knife from there, and then he told me that was where he carried it.

Q. Where did you see that?

A. On board the Jeff. Davis.

Q. Prior to the capture of the Enchantress?

A. I cannot say as to that.

Q. At what time did Captain Devereux and the mate of the Enchantress come on board the Jeff. Davis?

A. Between seven and eight o'clock in the evening.

Q. Were you ordered below when the vessel came up?

A. I was.

Q. At what time were you ordered below?

A. Sometime before they came up to us; I should say they were four or five miles off, when we were ordered below.

Q. And you were kept below until what time?

A. Until they had captured her. I looked up through the skylight and saw them haul down the French flag and hoist what they called the Confederate flag; I never saw that flag before in my life.

Q. And then you were allowed to go on deck, after the capture? What do you mean by after the capture? after the vessel sailed?

A. No; after they had taken charge of her.

Q. After who had taken charge of her? the lieutenant?

A. Yes, sir; and his crew from the brig Jeff. Davis.

Q. Did you see the lieutenant and his crew return to the Jeff. Davis?

A. Oh, yes.

Q. When did they return?

A. They returned with Captain Devereux and Mr. Page, and, I think, Captain Devereux's son.

Q. In whose charge was the vessel when they returned?

A. In the charge of the prize crew.

Q. Did you see the prize crew leave the Jeff. Davis?

A. Yes, sir. I saw the second lieutenant, Mr. Stewart, make out the list; I sat by the side of him at the time, on board the Jeff. Davis when he made out the list for them to go.

Q. Do you recollect the names in that list?

A. Yes, sir; there sits a man whose name was first on the list, [pointing to the prisoner.]

Q. How many men went?

A. Five, with himself.

Q. Did they return to the Jeff. Davis?

A. No, sir.

Q. What time in the evening was that?

A. Somewhere about seven o'clock; it might have been before, it might have been after. I cannot say exactly.

Q. Do you recognize William Smith as that man?

A. Yes, sir.

Q. Did you see him frequently on board the Jeff. Davis while you were there?

A. Of course I did. I was in his company all the time, sometimes near, sometimes not. We were always as near as the business of the vessel allowed.

Q. Give us a little notion of the character of the armament of this vessel? How many guns had she.

A. She had an eighteen pound pivot gun, that went around, worked any way, amidships, and she had four other guns, two on each side.

Q. Did you see any pistols?

A. She had also a rack down below in her cabin of double barrelled guns. I cannot say how many there were; there might be fifty for all I know, I should not say there was much less than fifty.

Q. The Enchantress and the Jeff. Davis parted company about eight o'clock in the evening?

A. Yes, sir.

Q. That was the last you saw of the Enchantress?

A. Yes, sir, until she arrived in Philadelphia.

Q. How did you get to Philadelphia?

A. I came here in the ship Mary Goodell.

Q. With your captain?

A. Yes, sir, with Captain Fifield.

Q. And with Captain Devereux and Mr. Page?

A. Yes, sir.

Cross-examined by Mr. Wharton.

Q. I think you said it was the second lieutenant that made out the list of the prize crew?

A. Yes, sir.

Q. He wrote their names down on a piece of paper?

A. Yes, sir, he wrote their names down.

Q. Did he hand that paper to Smith?

A. I do not know what he did with that paper; he went away from me then.

Q. With the list in his hand?

A. Yes, sir.

Q. Did you see Smith leave with the men under him?

A. Yes, sir, I saw him go away.

Q. How near were you to him while he was making out this list and picking out the prize crew?

A. We were sitting side by side.

Q. Then you heard what he said to Smith, I presume?

A. No, he only picked the crew out himself. I saw him pick out the crew for the other schooner, also.

Q. That I am not asking about; but just this particular thing. What direction did he give Smith?

A. He did not give him any directions that I heard. I only saw him make out the list.

Q. Then you did not hear him or see him direct Smith to go on board?

A. No, sir.

Q. How long afterwards did that occur?

The WITNESS. After when?

Mr. WHARTON. After he made out the list.

The WITNESS. Before Smith went on board the vessel?

Mr. WHARTON. Yes, sir.

The WITNESS. I do not know as to that. It might be an hour or two hours.

Mr. WHARTON. I thought it occurred probably at the same moment, from the manner you described it.

The WITNESS. While they were boarding, he made out the list of the prize crew who were to go.

Q. Then they were selected beforehand, and an hour or two afterwards they left?

A. Yes, sir.

Q. Then you were not with the second lieutenant when he sent them on board?

A. No, sir.

Q. Did you know where the Enchantress was to be taken to?

A. It would be impossible for me to tell where they were going to. I cannot tell you. I heard on board the vessel that they intended to take her to some Southern port, Charleston or Savannah.

Q. Do you know of any messages being sent along with them, or letters, or anything?

A. No, sir. I saw papers sent

Q. What papers?

A. I do not know what they were.

Q. What do you mean by "papers?" newspapers?

A. No; not newspapers, but some papers that they had, that they took with them.

Judge CADWALADER. You mean the prize crew took certain papers with them?

The WITNESS. Yes, sir.

Mr. WHARTON. From whom were those papers received by the prize crew?

A. I do not know. They used to handle the papers of every vessel they took, from one to the other. I did not take particular notice.

Q. But you know the fact that certain papers were taken by the prize crew on board the Enchantress?

A. Yes, sir.

Q. Where did you sleep while you were on board the Jeff. Davis?

A. In various places. I slept in the cabin, I slept in the hold, and I slept on deck.

Q. According to the necessities of the occasion?

A. No, just as I chose.

Q. Then you had an option of sleeping pretty much all about?

A. I had a bunk in the cabin. It was taken away from me, and I was told to sleep in the hold; and one night I slept on deck.

Q. You got your meals regularly?

A. Yes, sir.

Q. How many days were you there?

A. From the 6th to the 9th of July.

Mr. ASHTON. What did you eat on board the Jeff. Davis?

The WITNESS. Our own provisions principally—the provisions that were taken from the different prizes.

Mr. WHARTON. Do you happen to know who was the captain of the Jeff. Davis?

A. Captain Coxsetter, I believe.

Q. Do you know the list of officers that she had?

A. I can tell you some. Postell was first lieutenant, and Stewart second lieutenant.

Q. Were there any other officers that you know of?

A. There was a doctor; I forgot his name.

Q. Was it Babock?

A. Yes, that was it,

Q. Were there any other officers?

A. They used to have petty officers, such as boatswain and stewards, but I do not know their names.

Q. They had the usual petty officers on board a vessel?

A. Yes, sir; they termed them such, I believe.

Q. Had they a sailing master?

A. I do not know.

Q. Who navigated the vessel?

A. I do not know. I used to see all hands at work in navigation.

Q. But you do not know who directed her, whether it was the captain, first lieutenant, or some other officer?

A. I do not know.

Q. Had the marines a captain or commander?

A. Yes, sir; there was a captain and a lieutenant of marines on board.

Mr. HARRISON. Can you mention the names of the five persons who you stated were put along with Smith, on board the Enchantress, as a prize crew?

A. I can give you the names, I think.

Mr. WHARTON. When did you happen to make that memorandum that you are looking at?

The WITNESS. I have memorandums from the time I was taken.

Mr. WHARTON. Then it is contemporaneous history—very valuable of course.

The WITNESS, (after consulting a memorandum book). The prize crew consisted of Smith, Lane, Bradford or Radford, (I do not know which it was,) and two others whose names I do not recollect.

Mr. HARRISON. Were there five besides the defendant, or five in all?

The WITNESS. There were four besides Smith, he made five.

THOMAS B. PATTERSON called and affirmed, and examined by Mr. ASHTON.

Q. You are deputy marshal of this district?

A. Yes, sir.

Q. How long have you been deputy marshal?

A. Since the first of May, I think.

Q. Do you recollect arresting Smith, the prisoner at the bar?

A. I do not recollect the name. I recollect arresting five prisoners; I think Smith was one of them.

Q. Upon a warrant issued by whom?

A. By Mr. Heazlitt, United States Commissioner.

Q. Did you make the arrest yourself personally?

A. Yes, sir.

Q. Where was the arrest made?

A. At the Navy Yard. I took them from on board a vessel.

Q. What vessel?

A. It was the Albatross.

Q. Where did you find the prisoners?

A. They were down below when I went on board the vessel, and they were ordered up by the commander of the vessel.

Q. Were they in irons?

A. They were in irons.

Q. To whom did you show your warrant when you first went on board the vessel.

A. The commander. I told him I had a warrant for the prisoners.

Q Who pointed them out to you as the prisoners?

A. They were brought up and put into carriages in irons. I did not disturb the irons.

Q. Where did you take them?

A. To Moyamensing prison and lodged them there.

Q. Where was the Albatross lying at that time?

A. Lying at one of the wharves of the Navy Yard, right alongside the wharf?

Q. Was she moored to the wharf?

A. Yes, sir.

Q. Had you any conversation with the captain of the Albatross in regard to them in their presence?

A. Not in the presence of the prisoners.

Q. Had you a conversation before they were brought before you?

A. No, sir.

Cross-examination by MR. WHARTON.

Q. You say you arrested these men, and they were in irons?

A. Yes, sir.

Q. Is that what you would say was an ordinary arrest, to take a man who was already in irons and in the custody of somebody else?

A. I do not know. I took them just as they were.

Q. Be kind enough to describe to the jury the character of the irons; how were they fastened?

A. I think they were ironed, hands and feet.

Q. Describe the character of the irons, or manacles, or whatever you call them?

A. I think the irons on their wrists were the ordinary cuffs with a bar; and on their feet they had a short chain, just so that they could move about and walk.

Q. How was the chain fastened? To either or both legs?

A. To both legs.

Q. How fastened?

A. There was a band that went around the ankle and then a chain connecting the two bands.

Q. What was the weight of these irons?

A. They were not very heavy. I do not know what the weight was. They were light.

Q. Have you got them?

A. No, sir.

Q. What has become of them?

A. I sent them on board the vessel again.

Q. You did not preserve them?

A. No, sir. They belonged to the vessel.

Q. How did you know that?

A. The captain told me so. He asked me to send them back immediately. They were sent back.

Q. When you went on board the vessel these men were down in the hold?

A. Yes, sir.

Q. Did you go down there?

A. No, sir.

Q. You say they were ordered to be brought up: were they able to walk?

A. Yes, sir. The chain was long enough to allow them to walk. They walked from the vessel and got ashore.

Q. Do you know how long they had been confined in the hold thus ironed?

A. No, sir. I do not know anything about that?

Q. Where is the captain of the Albatross? Do you know?

A. I do not know.

Q. How long ago was this?

A. I cannot tell you without referring to the dates in the marshal's office.

Mr. WHARTON. I suppose the warrant is here on file. That would give the date.

The WITNESS. The warrant would give the date; but it is not here. I believe it is down at the prison.

Q. What is the name of the captain of the Albatross?

A. I do not recollect his name.

Q. He is an officer of the United States Navy?

A. Yes, sir.

Mr. ASHTON. Captain Prentiss was captain of the Albatross at that time, and I presume is now.

Mr. WHARTON (to the witness.) Do you know where the Albatross is now?

A. I do not.

Q. Do you know any of the other officers of the Albatross?

A. No, sir.

Q. How soon after her arrival, did you go on board and receive these men?

A. I think it was two or three days after the arrival of the vessel. I am not certain as to that.

Q. Who made the oath for the issuing of the warrant?

A. That I do not know. The oath, though, was made here.

Mr. WHARTON. It ought to be among the records here.

Mr. ASHTON. I will see where it is. I presume Mr. Heazlitt has it.

Mr. WHARTON (to the witness.) Was it necessary to lift the chain to enable the men to get into the carriage?

A. It was necessary to lift them into the the carriage; but they walked freely.

Q. What was the length of the chain?

A. About twelve inches, perhaps a little longer. I did not take very particular notice of the length. They could move about freely, though.

Q. Do you know whether the Albatross brought along with her any papers that were taken with these men?

A. I do not.

Q. You do not know whether the captain of the Albatross had possession of papers belonging to them?

Q. I do not know anything about that. I merely made the arrest.

CHARLES W. PAGE recalled and examined by Mr. ASHTON.

Q. Do you know where the Enchantress is at present.

A. I believe she is on her way from St. Jago to some Northern port.

Q. Were you in Philadelphia when she sailed from this port?

A. I was.

Q. When did she sail from Philadelphia?

A. I think it was the 22nd or 23rd of August, I cannot state positively.

Q. Were you present when she sailed?

A. Yes, sir.

Q. Did she go down the river?

A. Yes, sir.

Cross-examined by Mr. WHARTON.

Q. You say the Enchantress sailed from this port on the 22d of August for some foreign place. Were you here at the time?

A. I was.

Q. How did she get here: was she brought up by the Albatross?

A. That is more than I can tell you.

Q. How long had she been here when you knew she was here?

A. I cannot tell.

Q. Then how do you happen to know that she sailed from here just on the 22nd of August, and know nothing else about her?

A. I was telegraphed to at the place where I belong to, to come on here and go in the vessel.

Q. When you came here you found her here?

A. Yes, sir.

Q. You do not know that she was brought here by the Albatross?

A. I cannot swear to that. I have read that; that is all I know about it.

Q. You had not been here at all before that?

A. I had not.

Mr. WHARTON. Of course, that accounts for you not knowing what occurred in the interval.

Mr. ASHTON. Did you see the log of the Enchantress when she sailed.

The WITNESS. The log was on board.

Mr. ASHTON. What log?

The WITNESS. The log book that was originally on the Enchantress.

Mr. ASHTON. I now offer in evidence the Appendix to the United States Statutes at Large for the 37th Congress, 1st Session, containing the various proclamations of the President of the United States in relation to the rebellion.

Mr. Wharton. Certainly.

Mr. Ashton. We rest here for the present.

Mr. Wharton. I should like to have the date of the affidavit from the warrant, as part of the case of the United States. A witness was on the stand, who, by reference to a document in court, could fix the date. Mr. Patterson said he could not speak of the date without reference to the warrant.

Judge Cadwalader. Is your sole purpose to get the date?

Mr. Wharton. Not my sole purpose. It is to get the date and also see whose affidavit it was, and perhaps it may lead to an inquiry why that person is not here. I do not know who made the affidavit.

Mr. Ashton. Nor do I. I know that the arrest was upon an affidavit. Whose affidavit it was, I do not know. Mr. Wharton can prove that as well as we can.

Judge Grier. Can that be material in any possible point of view?

Mr. Ashton. I do not see how it can be.

Judge Grier. I suppose if that paper is found at any time, it will be brought here and handed to the counsel.

Mr. Wharton. That will satisfy us.

Mr. O'Neill opened the case for the defence, as follows:

With submission to your Honors, Gentlemen of the jury, it is my part in this case to lay before you the answer of this prisoner, to the very grave and serious charge of which he stands indicted; and in doing so, I shall not prolong this trial by any lengthened opening, but shall briefly state to you the facts upon which we shall rely, in asking you hereafter for a verdict of not guilty.

As the learned Gentleman for the Government has told you, this prisoner stands indicted for the crime of piracy. The definition of that offence you learned as the case, on the part of the Government, was opened. We shall assume it for the purposes of this case, and shall hereafter contend before you, that the facts, submitted on the part of the prosecution as well as those to be submitted on the part of the defence, remove the case of this prisoner outside the scope and terms of the crime, as defined by the District Attorney.

The learned gentleman has told you the ingredients of the offence, and those requisites of proof to be established, on the part of the Government. I need not tell you that they must be satisfactorily made out, and that failing in any essential particular, it will be our duty to ask, and yours to render, a verdict of not guilty. Piracy, as you have heard, and as we assume it to be, is any violent depredation on the high seas with a felonious intent. To this definition, gentlemen, it will be your province to apply the facts of the case. There must be a violent depredation coupled with a felonious intent. I need not tell you, gentlemen, the meaning of a felonious intent. The world knows,—the desire that prompts the thief to plunder, and impels the highwayman to strip his victim. With him there is no distinction of person, age, or sex. The strong, the weak, the old, the young, are all alike to him: his desire of theft hurries him on to acts of plunder, and discrimination is alone made, in the riches of the wayfarer. So, gentlemen, it is with the pirate. He roams the sea, the enemy of this wide world's family; nations, to him, are alike; flags and national ensigns, to him, have no character; his heart loves and seeks but plunder, and his strong hand takes it away. Such, gentlemen, in our idea, is the pirate, and such to you must appear the prisoner, before you can convict him as he stands charged.

We shall, gentlemen, contend before you that the prisoner had not and did not in any way, share, at the time of this occurrence, the *animus furandi*, as the law terms it, that guilty intent, that disposition for theft which is the very heart of this indictment, and in the absence of which he must be acquitted. To this part of the case, though not altogether, our defence shall be directed.

You know, of course, the difficulties out of which this case springs, and I do trust that in laying before you the defence of the prisoner, we shall not scandalize your patriotism, by establishing, as a fact in this cause, the present political state of the South. Unfortunate and wrong, deeply wrong, as that position may be, we shall have, though condemning and deploring it as intensely as you, to contend that, in this issue, and in this the prisoner's hour of peril, it must be his shield and protection. As a necessary part of our case, we shall prove to you, gentlemen, that there exists such a thing as a Southern Confederacy; that there is South a government in fact, issuing letters of marque, and that they were duly granted to the command under which this prisoner served, and in obedience to which he had been engaged when arrested on the the high seas, and brought to Hampton Roads.

You will ask me what relation has this with the case before you. I shall tell you, gentlemen. The prisoner was a citizen of the South; he owed allegiance to his State, and that allegiance was to be promptly rendered or penalties almost as heavy as the one that now hangs over him, were soon to follow. He was forced to serve his State in a military or naval capacity; to enlist as a soldier on land, or go on board as a mariner. There was no volition left for him, no aid to help his loyalty; the protecting arm of the Federal Government reached not him, or his home; and to delay obedience to the laws of his own State, would be but to have his property sequestered, himself imprisoned, or banished from those he loved, and who looked to him for aid and protection. Being forced to serve, he went on board the *Jeff. Davis*, for he was cradled

on the sea, and followed its life, from his earliest childhood, preferring this service as more consonant with his habits and education. Whilst thus, gentlemen, yielding forced obedience, whilst thus acting under the order, command, and authority of the South, he was taken by the *Albatross*.

Gentlemen, is he the pirate, the *hostis humani generis*, who roamed the sea without flag or nation, ready to and willing to strip the first victim that might cross his way? Is he the public robber on the sea, who draws his knife as he meets his victim, and says "your property or your life" irrespective of person, age, or nation? No, gentlemen, the mind that prompts the pirate,—and you know the meaning of the term,—never urged him to the act for which he stands indicted. He must be proved as having this intent, ere he be found guilty. You may look upon him as having erred in judgment. Be it so. That error is not indictable, nor has indiscretion ever had a place in the calendar of crime. To be amenable to this tribunal, the prisoner must have had freedom of thought to reason, freedom of judgment to decide, and freedom of will to act in accordance with his own decree. The heart must err and show that error in some act, ere this law of nations seeks its vengeance at your hands.

If this prisoner has acted with an honest confidence in this commission of the South, as we shall contend he has, or if forced to act he went on board this vessel,—and this the facts will show,—he must go hence untouched as their Honors will tell you. If owing allegiance to the South, and that allegiance was to be rendered in military or naval service, and this prisoner being forced to one or the other, assumed as more congenial to his habits, I might say his cradle, the duties of the latter, you cannot, gentlemen, under the laws of your country, convict him. He is not the pirate whom the laws would punish with death, because his heart is free of the malice which gives the crime its infamy and its punishment.

We shall show you, gentlemen, that the life of the prisoner has been such as to repudiate the offence charged. The history of himself and his little home shall be leaf after leaf unfolded, yes, from the moment when, thirty years ago, he sought the sea as an humble pilot, to this very hour when he stands indicted of piracy, on the very waters where his reputation was made, and his name respected. After we shall have done this, gentlemen, we shall call on you to say that he is not the public enemy who went on board this vessel, to plunder indiscriminately, the Frenchman, the Englishman, or any other citizen of the world; but that forced there, he acted under a compelling and inexecrable authority, which must now be his defence, and plead his excuse.

The different proclamations of the President, as well as those of Mr. Jefferson Davis, will be laid before you, and fully will you hear of the present condition of the South. Want of jurisdiction in this court to try this alleged offence will also, gentlemen, be urged before you and their Honors.

I believe I have now opened the case of the defence as advised, and I shall leave it to be hereafter discussed by my learned colleagues, who are, and I hope with success, to argue it before you.

Mr. Harrison. Before calling any witnesses, we propose, if your Honors please, to present as evidence in this case, because they are matters of public notoriety and part of the history of the country, the Constitution, proclamations, and laws, and various proceedings of what is called the Southern Confederacy, as contained in thes three volumes of a book published in the City of New York, and entitled "Moore's Rebellion Record."

Mr. Ashton. For what purpose?

Mr. Harrison. To show that there was such a Constitution, and that there were such laws, proclamations, and proceedings as they purport to be. I do not present them as evidence of the authority of the Southern Confederacy to make or to issue any such laws, proclamations, and Constitution, but simply as part of the *res gestæ* of this case to go before the jury and before your Honors so as to permit us to be heard in regard to them.

Mr. Wharton. For the purpose of showing the existence of a government *de facto*, claiming to be such and to administer justice, and to regulate those persons actually within its jurisdiction, whether rightful or wrongful that jurisdiction happens to be.

Mr. Harrison. And to show the *quo animo* with which this act was done.

Mr. Wharton. Your Honors are no doubt aware, that, there are consequences resulting from the facts, if the evidence is admitted, which it is unnecessary now to discuss, but, which will be discussed in an after stage of the cause. We are simply stating now the points of fact that we desire to prove and the purpose of laying those facts before the court and jury.

Mr. Harrison. I stated to your Honors the day before yesterday, that I had made every possible effort to obtain that evidence in an authentic shape; but, owing to the extreme difficulty, indeed, I may say, the impossibilty of postal communication with the only source from which that information could be obtained, we were compelled to resort to this as the only possible evidence of these matters within our reach.

Judge Grier. Do the gentlemen representing the government object?

Mr. Ashton. Yes, sir, we object.

Judge Grier. On what grounds?

Mr. Ashton. On two grounds; first.

that there is no evidence that this book contains correct copies of these documents; second, that it is not pertinent to the issue, because it would not either excuse or justify the acts proved to have been done by the defendant.

Judge GRIER. Suppose it is all the excuse or justification they have got, have they not a right to show it and have the court pass upon it?

Mr. ASHTON. I merely make the objection, and state the grounds on which it rests, and ask your Honors to pass upon it.

Judge GRIER. You want us to decide what may be the grave question of the cause, on a mere point as to the admission of testimony. I am inclined to admit the testimony if it is all relevant to the defence. Whether that defence is a good one or not, is to be considered afterwards.

Mr. KELLEY. May it please your Honors, as I understand the offer now, it is to put in a certain book called "The Rebellion Record," which, from my general recollection contains a large amount of poetry.

Judge CADWALADER. I do not understand the offer in that way, but it is to submit particular parts of the book.

Mr. WHARTON. We propose to offer specific parts. The poetry we leave to the other side.

Mr. KELLEY. We would rather go to a purer fountain, even for that.

Judge GRIER. I suppose it is proposed to give historical evidence of historical facts.

Mr. WHARTON. That is it; and it happens to be found in a particular book. It may be damaged by intercourse with poetry, we do not know. We only offer what purports to be official documents,—as official as anything from such a source can be. We do not offer the book in the mass, but merely as containing a list of those public documents, which we can best reach in this form—no better for being in the book, perhaps no worse.

Mr. HARRISON. If there is any other and more authentic publication of these facts, we shall accept it from the learned counsel on the other side.

Judge CADWALADER. Whatever documents are offered, I think ought to be particularly indicated and read. We cannot consider such publications as this in a lump. Or, if counsel do not wish the trouble of reading them aloud, the page and line may be indicated, so that the Court may examine the various documents. We cannot understand a book of that sort to be in evidence, without the parts which counsel desire to consider being particularized. It would be inconvenient to both sides.

Mr. HARRISON. I want first to present the Constitution of the Southern Confederacy, and the Secession Ordinances of the Southern States.

Judge GRIER. The offer is to show the Constitution of the so-called Southern Confederacy, and the Secession Acts of the different States.

Mr. HARRISON. Yes, sir.

Judge GRIER. I am disposed to admit it. You cannot get absolutely authentic copies of those documents. They are regarded as historical facts, and you must take the best historical evidence you can get. Indeed, they are referred to in the President's proclamation already produced by the prosecution. It is now proposed to offer them as historical facts. We never decide the value of evidence on such a point. If it tends to prove the defence, (whether that defence be good or bad,) we think the testimony should be received. We should prefer to have authentic copies of these documents, properly certified; but that being impossible, and the facts being historically true, there ought to be some way of getting at them. I do not know what effect they may have. We shall have to consider that after the documents are before us. But, as the case now stands, I think this offer ought to be admitted.

Mr. ASHTON. My objection did not apply to the form in which the documents are, but to the documents themselves. I think if those documents themselves were here properly certified, they would not be evidence to justify the crime.

Judge GRIER. That question is not decided. A man's defence ought to be the best he can make. If the testimony tends to prove it, it ought to be received; and then, whether that can be a justification or not is afterwards the question of the case to be decided; but you must have the case before you, before you can decide it.

Mr. ASHTON. It was decided in Hutching's case tried in the Circuit Court of the United States, before Chief Justice Marshall at Richmond, in 1817, (1 Wheeler's Criminal Cases, 543,) that on a trial for piracy, a commission as a privateer from a government not recognized by the United States, cannot be received in evidence as a valid commission, but only as a paper found on board the vessel, and cannot be received to justify piratical acts.

Judge GRIER. You can find hundreds of cases, both civil and criminal, where the essence of the case has been decided on the admission of testimony. I only say, as a matter personal to myself, that I never do it. If the testimony offered is proof of the defence urged, I always admit it, and decide on it when the whole case is presented. I know you will find hundreds of cases to

the contrary. I do not act on authority when I so decide, but on my own particular method of doing business, which I think is just and right.

Mr. Ashton. My impression was that the authorities were in a different direction, that it was first to be seen whether the defence would be a good defence, before testimony would be admitted.

Mr. Wharton. I will give your Honors some documents by date and specific reference, that we offer: first, the proclamation of President Lincoln, of April 15, 1861, to be found on page 301 of "Upton's Maritime Warfare and Prize."

Judge Cadwalader. Excuse me for suggesting that you have that in a more authentic form.

Mr. Wharton. I know the District Attorney has offered it. I merely allude to it now in connection with other documents in the same book. We next offer the proclamation of Jefferson Davis, dated April 17th, 1861, which is the proclamation under which these letters of marque and reprisal were issued. That is to be found on page 302 of Upton's Work. That was followed two days afterwards by a second proclamation of the President of the United States, dated April 19th, 1861. Then followed the proclamation of President Lincoln of April 27th; and then the proclamation of Comodore Pendergast, of April 30th.

Judge Cadwalader. Notification, you had better call that.

Mr. Wharton. It is a notice of the blockade by Commodore Pendergast on the 30th of April, referring to the President's proclamation of the 27th, and therefore properly a notification, undoubtedly. Then, next in order is the proclamation of President Lincoln of the 3d of May. Next, is the proclamation of Queen Victoria. We give that in evidence to show the state of hostilities in the apprehension of the civilized powers of the world, as existing between the so-called Confederate States of America and the United States of America. It is to be found at page 304 of Upton. The date is the 14th of May, the District Attorney tells me. Then I offer in evidence, simply as proof of the facts I have just mentioned and other facts connected with the subject, Twiss' Law of Nations, the London edition, published in the present year.

Judge Cadwalader. Would you not prefer reading that as authority in the course of the argument?

Mr. Wharton. We offer it as historical evidence of a state of facts existing in this country. Your Honors will see how it bears on the case as part of its general complexion, showing the manner in which the state of things in this country is viewed by other nations. On pages 56 and 57 of Twiss' Work—I am now merely making an offer and describing what the offer is—will be found a historical statement of the occurrences in this country, and the dates of the different secession ordinances of the States, and of the Constitution of the so-called Confederate States. The provisions of these ordinances and this constitution are historically mentioned and treated in this book, and the facts alluded to as existing facts in the history of the world.

Judge Grier. You may offer that book as the best evidence you can get of the dates of certain proclamations and certain ordinances of these men; but we cannot receive as authority his opinion of the facts or the opinion of people in Europe who do not care a fig about the matter.

Mr. Ashton. If I remember Twiss's book aright, it announces the fact that certain secession ordinances were passed at certain times.

Judge Grier. We all know the fact that they were passed.

Mr. Wharton. The secession ordinance of South Carolina is dated December 20, 1860. Then the Constitution of the so-called Confederate States of America for their provisional government, is dated February 8, 1861. Then, I offer this book as proof of the fact, which perhaps could only be proved historically in some such way, that Mr. Jefferson Davis, whose proclamation I have put in evidence, was inaugurated as President of the so-called Southern Confederacy on the 18th of February, 1861—prior to the date of the proclamation that I have given in evidence; I think the locality was Montgomery, Alabama.

Mr. Kelley. We agree that that book and the "Rebellion Record" may fix the date of the various secession ordinances.

Mr. Harrison. If your Honors please, there are sundry proclamations which were issued by the Southern Confederacy after its formation, and some which were issued by the various States composing that Confederacy, from time to time, which I desire to offer. If your Honors insist on our giving you a note of these documents regularly, we must ask a little time in order to enable us to ransack this "record" and furnish the dates. It is proper for me to state that that would have been done, and I would not stand here now offering this evidence in this wholesale manner, but that I was under the impression that this "record" would be considered as in evidence, to be taken up, and referred to, and commented on by counsel on both sides, in part or in whole as might be deemed necessary.

Judge CADWALADER. But you do not now ask to put it on that footing. You ask to put it in as evidence. It is very likely that, if nothing had been said on the subject, the counsel on both sides might have referred to this as matter of public notoriety and conceded all that you ask; but you desire, with prudent caution, to have the matter on which you rely particularly cited. It is to promote your own wishes, Mr. Harrison, that if you desire that, you must make your offer particular.

Mr. KELLEY. I think that the opening of my learned brother (Mr. Ashton,) exhibited just such a desire on our part, and I tried to make my friend on the other side understand that such was our desire.

Judge GRIER. Counsel may refer historically to any book that shows the date when particular acts were done.

Mr. KELLEY. Originally, we did not feel disposed to file an agreement that that might be done, and we do not now feel disposed to admit that that which is not legal evidence should be admitted; but we were disposed to take the great facts before the country from the best sources we could get them. I have, myself, relied largely upon this very "Rebellion Record" which is before us. Twiss's book appears to have been compiled with great care—I mean as to its facts, not as to its theories of law. As to its facts, it seems to have the dates accurately.

Mr. WHARTON. I take it that where you refer in the course of a case historically to historical facts as bearing on the case, you can only refer to them properly as matters of evidence bearing on the case; and as there seemed to be a little misapprehension between the other gentlemen in this case, (in which I was not a partaker at all,) I thought I would put our proposition in a formal shape by the offer of the evidence which has been received; and it seems to me to be enough to fill up the general outline of the case, and then the other documents which are subsidiary—the acts of the different States, the warlike proclamations, &c.—we may perhaps leave for reference as we go along.

Judge GRIER. They are matters of very little importance. You have the great facts.

Mr. WHARTON. We have the great fact of a government *de facto* in the South, and especially the proclamation authorizing these letters of marque and reprisal; and as this was a charge of piracy, that proclamation seemed to me to be the great document in the case.

Judge GRIER. Certainly enough to raise your defence.

Mr. WHARTON. Enough to raise the question whether this man is or is not a pirate or robber.

Mr. HARRISON. I am very sorry to be under the necessity of troubling your Honors again; but I want to know, and with the permission of your Honors, I intend to know, how I shall stand when I come to sum up for the defence. I desire to know whether, under the view announced by your Honors now, I shall be at liberty to comment on the sequestration and confiscation and militia laws of the Southern Confederacy as I shall find them laid down in this "Rebellion Record." If I cannot have that permission without specially referring to them now, I ask to be allowed a few moments until I can specify such portions of this book as I desire to refer to. I do not intend to be met again, as I have been met to day, with objections that I did not anticipate.

Judge CADWALADER. I do not think you have met with any embarrassment.

Mr. HARRISON. Certainly not on the part of your Honors.

Judge CADWALADER. Nor any from counsel that need cause you any difficulty. Although it would have been more convenient if these things had been prepared beforehand, it is perfectly agreeable to the Court that you should sit down now and take all the time you want to do what you suggest.

Mr. HARRISON. I will select the documents which I propose to offer.

Judge CADWALADER. If it is preferred the gentlemen can defer this part of the case until to-morrow morning.

Mr. HARRISON. That will be very satisfactory.

Judge CADWALADER. In the mean time you can go on with your oral testimony.

EDWARD ROCHFORD called and *sworn*, and examined by Mr. HARRISON.

Q. Where were you born?

A. In England.

Q. In what State were you living when you joined the service of the Southern Confederacy?

A. Georgia.

Mr. ASHTON. Excuse me for interposing; but it is proper for me to state to the Court that this is one of the defendants who have been indicted for the same crime in another bill.

Judge CADWALADER. Mr. Rochford, you will understand that you are not bound to answer any questions which may tend in any way to criminate yourself, as it is said you are also under charges. You understand that what you answer will be of your own free will, and you will not injure yourself by being silent. If you choose

not to answer there is no unfavorable inference against you. Do you understand me?

The WITNESS. Yes, sir.

Mr. HARRISON. I am counsel for Mr. Rochford, and would, therefore, hardly ask him a question in this case that would embarrass his defence. I am very much obliged to the Government, though, for its interposition. [To the witness.] Do you know of what State the defendant, William Smith was a resident?

The WITNESS. He lived in Savannah, Georgia.

Q. Has he, or has he not been a resident of Savannah, Georgia, for several years?

A. Yes, sir. He has been a branch pilot there. I knew him to pilot in several vessels whilst I remained there. I saw him on board vessels. I was going to Europe in the summer and coming back in the fall.

Q. He was a resident of Savannah at the time and before the commencement of the difficulties between Georgia and the Government of the United States?

A. Yes, sir.

Q. Do you know that fact?

A. Yes, sir.

Q. Are you acquainted with the prisoner's family?

A. I was acquainted with both his brothers-in-law and a brother of his.

Q. Do you not know that he is a married man, with a family?

A. Yes, sir.

Mr. KELLEY. One moment. I do not see the pertinency of this kind of examination.

Mr. HARRISON. We can argue that hereafter.

Judge GRIER. I suppose it does not make any difference whether he is married or not; but if the gentleman thinks it of any importance, let him ask it.

Mr. HARRISON. It may be important as showing that he had reasons for not desiring to submit to the confiscation or sequestration of his property. [To the witness.] Did you see Smith on board the Jeff. Davis?

The WITNESS. Yes, sir.

Q. Who was the captain of the Jeff. Davis?

A. Coxsetter.

Q. State if you ever saw or heard the letters of marque and reprisal, or what purported to be letters of marque and reprisal, read to the crew of the Jeff. Davis?

A. Yes, sir. I saw them and heard them read by the purser, Mr. Babcock.

Q. State when that occurred and in what way it was done?

A. On the 12th of June, Captain Coxsetter called all hands aft. We were lying in the harbor of Charleston. The purser and the captain stood together and said they were letters of marque issued by President Davis, of the Southern Confederacy. He read them.

Q. Did this letter purport to give an authority to the Jeff. Davis to make war upon the Government of the United States?

Mr. ASHTON. I object.

Mr. WHARTON. Suppose he states what he heard read.

Judge CADWALADER. That would be better.

Mr. WHARTON, (to the witness.) Just state what you heard read?

A. They gave authority to the brig Jeff. Davis to wage war against the United States, as near as I can explain it.

Mr. HARRISON. Was there any portion of the brig Jeff. Davis where the letters of marque, or a copy thereof, or a reference thereto, was stuck up in a public place?

A. No, sir.

Q. Was it under that letter, that Mr. Smith and the rest of the crew enlisted and served?

A. When the full number were on board that were going in the brig, it was read to us.

Mr. KELLEY. State only what you know.

Mr. WHARTON. Was Smith there?

The WITNESS. Yes, Captain Smith was one of the men.

Mr. HARRISON. Now tell us if you know anything about the operation of the sequestration, confiscation, and militia laws of the Southern Confederacy?

Mr. ASHTON. That I object to.

Mr. HARRISON. Let me put the question in a specific form and you can make a specific objection. [To the witness.] Can you state how far the militia laws of Georgia, at the time of which we are speaking, compelled persons to render either military or naval duty to the State of Georgia and to the Southern Confederacy?

Mr. ASHTON. We object to that.

Judge GRIER. I do not think a person unlearned in the law can be brought here to testify to the statutes of another country.

Mr. HARRISON. Your Honors will see the point to which the question is put. I am not able to offer those laws because I have been cut off from all possibility of communicating with the only source from which they could be obtained.

Judge GRIER. You may speak historically of what everybody knows. Every one knows there has been great violence used down there, men compelled to enlist, &c.

Judge CADWALADER. What is it proposed to prove?

Mr. HARRISON. I simply desire to prove, that according to the state of things exist-

ing in Georgia at the time in question, all able-bodied men over the age of sixteen and under the age of sixty, were required to render military or naval duty or to leave the country. That has a bearing materially on the point of duress, which is one of the points on which we purpose to rely in this case. I think when your Honors consider the peculiar condition in which we are placed, and the impossibility of our being able to offer these laws in a more authentic form, and the material bearing they have on the *quo animo* of these parties, you will conclude that we ought to be permitted to offer this testimony.

Mr. Wharton. I will merely add to what my colleague has said, in order to put it in a slightly different shape, without by so doing interfering at all with the form of the question as he has put it, that we propose not so much to prove a foreign law by the testimony of a witness like the one at the stand, as to prove the fact that by any law, or without any law, (and that is unimportant as bearing on the intention of this party,) by the compulsion, so to speak, of those who administered the government there, he and others were compelled to render military or naval service to the existing government, whatever it was.

Judge Cadwalader. Mr. Harrison stated it differently. He said, "or to leave the country."

Mr. Wharton. I include that in the mode of putting it.

Judge Grier. If you could prove that the defendant was put on board the vessel by compulsion, against his own will, and served there (as many a man has done on a pirate vessel) contrary to his own will, that would be directly to the point.

Mr. Wharton. That is a strong statement of what would be within the same principle as what we propose to prove. I do not mean to put it exactly, as a matter of fact, in that shape, that he was carried on board by compulsion. I do not mean that the offer of evidence goes to that extent; but what I do mean to offer is, (not interfering at all with the point of view in which Mr. Harrison put it, which stands on its own merits,) that in the state of things existing in Georgia when this man was there, he was compelled by those who administered the government to render to that government military service, and that as the alternative of not doing it, he would be compelled to quit the country. How far that would in law amount to the sort of compulsion to which his Honor has referred, is of course, a question for argument hereafter; but the state of facts we desire to put in evidence is that, and it seems to us to bear very strongly on the intention of the party in carrying on the particular kind of warfare to which he devoted himself.

Mr. Kelley. May it please your Honors, if I understand the offer at all, it is to prove that there was at some time, in the State of Georgia, a law, which all these men may have participated in making, which they themselves may have brought about, which called upon every man to serve either in a certain army or navy, on the painful alternative of leaving that State. I take it that that can have no bearing on this case. If the gentlemen proposed to prove that this man Smith was impressed, forcibly seized in the streets of Savannah or elsewhere, carried on board this vessel, and there detained against his will, that would be perfectly competent. But suppose that there even were proof before the Court that there was such a law, and that these men had opposed its passage, it would not exclude (nor do I understand that there is a purpose to follow it up with the exclusion of) the alternative of leaving the State; it would not show that they were in any wise impressed, that they did not voluntarily choose the position they assumed and acted upon when they captured the schooner Enchantress. I cannot see its relevancy. Even under all the liberal offers of the government here as to what may be deemed testimony, I cannot see that it is the best which could be offered. If it were at all pertinent, relevant, or in any wise conclusive, we should not object.

Judge Cadwalader. The question at present is not the effect of it, but its competency. Mr. Harrison says, if I understand him, that he desires to prove that all able-bodied men in that country were required by law to render naval or military service, or leave the country. Mr. Wharton adds, "we desire to prove that this man was in fact compelled to enter into military or naval service or leave the country."

Mr. Wharton. As an existing state of facts there, where he was.

Judge Cadwalader. That is to say, the existing state of facts produced the necessity. Is that what you mean?

Mr. Wharton. Yes, sir.

Mr. Ashton. I should like to know which offer is before the Court—that of Mr. Harrison, or that of Mr. Wharton?

Mr. Wharton. Both.

Mr. Harrison. I thought it was agreed that this was a case in which we were not to be very particular as to form.

Judge Grier. I think we have got very wide already, but this is extravagantly wide.

Mr. Harrison. I respectfully submit that we may be able by this testimony to show such a state of facts as, if not amount-

ing to actual, positive physical force, would at least amount to that degree of moral and legal force which would constitute that kind of duress which would be a good legal defence to the accused here. That, however, is a question for argument hereafter, and I do not propose to go into it now. I did suppose that under the peculiar state of things existing here, in view of the impossibility of getting copies of these laws, we should be allowed to show by a witness who knows the fact, that these laws, so far as they were susceptible of producing duress, were brought to bear on the prisoner at the bar, and that under their influence he was induced to take the position which he did take at the time of the commission of the alleged offence.

Judge GRIER. A sort of moral duress.

Mr. HARRISON. Something more than that. If this man's home and property lay South, he may not have been able to afford to leave them. It may have been impossible for him, without an absolute sacrifice of everything, to leave the country in which he lived and to which, as we shall contend before your Honors, he owed at least an involuntary if not a voluntary allegiance How are we to get the benefit of this point? It is an important point in the case.

Judge GRIER. You might, more justifiably, I think, plead the total insanity of the people in the South altogether. The question was once asked whether a nation could be insane, as well as an individual. I have no doubt it can. You might as well set up national insanity. If, however, my brother Cadwalader has any doubt about it, your question shall be admitted.

Mr. HARRISON. I hope your Honors will give us the benefit of that doubt.

Judge GRIER. I do not know that he has any.

Judge CADWALADER. I am of opinion that this witness is not competent to testify as to the law of Georgia. When a question is put tending to prove any particular fact that occurred, it will be time enough to consider its competency.

Mr. WHARTON. Then I will put the question in the modified shape I suggested, whether at the time in question the defendant was not in point of fact compelled to render military service to the existing government of the place where he was, under pain of being turned out of the country if he did not.

Judge GRIER. It seems to me that that is only the previous question generalized a little so as to get clear of the particular facts on which it was rejected. It is only asking his opinion of a fact. I observe that it was very nicely put.

Mr. WHARTON. May it please your Honors, it is very difficult to view broad facts, such as national facts, without incorporating matters of opinion into the view of those facts. It is not like the question put by my colleague, which your Honors overruled, as to the existence of particular facts in certain figures written, as a statute law. You prove the existence of a certain public statute; there is no matter of opinion or conjecture about it. But when you deal with great political facts, it is different. Take, for example, the fact of an insurrection in the southern country. That necessarily involves matter of opinion. Upon that state of facts, we have in evidence the opinion of the President of the United States, as shown in his proclamations. He has stated that a rebellion and insurrection existed within certain teritorial limits. That is partly a matter of opinion; perhaps on the part of the President, altogether so, because derived from the information of others. He was not there, he did not see the assembling of armed men, and the commencement of belligerent operations. Those great national facts which are shown in that way are of themselves, necessarily, in a great measure, matters of opinion or judgment. That is in the case already, and all that I propose to ask of this witness now is, whether the state of things was not such that in point of fact the prisoner at the bar was compelled to render military service to the existing government. He will tell us exactly what he knows on that subject, and what the state of public opinion and of action there was in reference to this sort of conduct. I agree that it is partly compounded of the opinion of the witness; but I respectfully submit that that does not exclude it from the character of legal testimony in the case.

Judge GRIER. It strikes me that this is only inserting the words "in point of fact" in the previous question, in order to get the opinion of the witness. If there is a great insurrection, on this theory may not every fellow say "I had to go with them; there was so much violence and excitement, that I was forced to act with them," and thus may not the whole hundred or hundred thousand escape?

Mr. WHARTON. I submit that that is the only way you can deal with communities; and it is just that concentrated action which gives character to the act, gives it publicity, in fact. To refer to an analogy which was suggested by one of the Judges on the Bench in the case of insanity, it is very easy for a man to counterfeit or feign insanity so as to impress his neighbors and those who are conversant with him with the conviction that he is insane; but when you call a witness to testify as to the state

of mind of another, it is not an objection to his testifying to the fact that it is possible the whole of it may be feigned. I respectfully submit, therefore, that, although these questions do involve to a certain extent matter of opinion, that does not deprive them of the character of legal evidence. We cannot get at the fact of an existing law in Georgia, I presume, by any mode known to the laws of the United States. That is one of the facts in the case which we cannot get over.

Mr. Ashton. It is one of the enormities.

Mr. Wharton. It may be one of the enormities of the conduct of others, under whose enormity of conduct this defendant may be now suffering. I suggest that if a state of things existed at that time in the Southern country to induce the conduct complained of on the part of this defendant, he cannot be tainted with the imputation of that general spirit of plundering all mankind, which is an essential composition in the character of a pirate or sea-robber. It is all as bearing on that, that this testimony is offered, and I respectfully submit that in that shape the question may be properly put.

Mr. Harrison. There is, if the Court please, another point of view, in which this testimony, it seems to me, may be properly admitted. This is clearly a case where the party having shown the impossibility of obtaining that primary evidence which would alone be admissible if the circumstances of the case had allowed it, is justified in law in introducing that secondary evidence of which the case is susceptible. Have we not strictly brought ourselves within that rule of law which entitles us here to introduce before your Honors and the jury as secondary evidence the only possible proof in our power of the existence and character of the statute of Georgia? We are unable to obtain a certified copy from the State of Georgia. Every effort has been made to obtain it. More than twice have I written for the purpose of getting a full and authentic copy of all these documents, and I have been disappointed in obtaining them, in consequence of the impossibility of holding any postal communication with the Southern authorities or any portion of the Southern Confederacy. I submit to your Honors whether, upon that principle which authorizes the introduction of secondary evidence where primary evidence is unattainable, we are not entitled to ask this witness whether there is not in the State of Georgia a law of the description I have indicated, and whether its character is not of the purport which is embodied in the question before your Honors?

Judge Cadwalader. In view of the statement of the opening counsel for the defence (Mr. O'Neill), and of the argument on the question of evidence already decided, I think this question cannot be put, unless it is proposed to prove some fact of actual compulsion exercised as to the defendant in particular, or as to the crew of which he was one.

Judge Grier. My colleague has correctly stated the law.

Judge Cadwalader. I desire in this stage of the cause, to avoid, as far as possible, discussing the legal effect of these questions. I would merely remind the counsel of the decisions as to what shall constitute compulsion under such circumstances, particularly the cases of the Scotch Highlanders, which were very strong cases.

Mr. Harrison. Will your Honors excuse me for putting the question in another shape?

Judge Cadwalader. That is what I rather meant to invite.

Mr. Harrison. I will put it in this form: At the time the prisoner entered into the service of the privateer Jeff. Davis, what was the law of Georgia in regard to military and naval duty to the Southern Confederacy?

Judge Grier. That is more objectionable.

Mr. Kelley. Allow me to suggest a question of fact that may obviate all this difficulty; and that is, to learn whether this man joined the ship in the State of Georgia. That has not been shown yet.

Mr. Wharton (to the witness). Mr. Rochford, where did Smith join the Jeff. Davis?

The Witness. In Savannah.

Mr. Wharton. You have spoken of the reading of the letters of marque in the hearing of the crew?

A. Yes, sir.

Q. Did you leave the port of Charleston, and Smith with you, under those letters, after their reading?

A. We had to fit out the vessel after that time. There were some repairs to be done, both aloft and below.

Q. I want to know whether those letters made the contract between the men and the commander under which they entered into service?

A. Yes, sir.

Q. At what time did Smith leave there?

A. We left Charleston on Friday evening, June 28th.

Judge Cadwalader. I thought you said he joined at Savannah.

The Witness. We left Savannah about the 8th of June, and went to Charleston.

Mr. Harrison. Where were you taken,

after you were captured by the Albatross?

A. We were put on board the Albatross about twenty-five miles south of Hatteras Inlet, sailed to Hampton Roads, lay at anchor there, and then went up as far as the Potomac.

Q. How long did you lay at anchor in Hampton Roads?

A. About twenty-four hours

Mr. WHARTON. Were you taken up the Potomac, Smith with you?

A. Yes, sir. We were taken up the Potomac to relieve a steamer that was stationed there, which had to go somewhere else. We came to anchor there, and stopped forty-eight hours.

Mr. HARRISON. How far from the Virginia shore, at Old Point, were you at anchor?

A. About three-quarters of a mile.

Q. When you got to the month of the Potomac, how far from the Virginia shore were you?

A. As far as I can recollect, about a mile and a-half.

Q. Where did you go, when you left the mouth of the Potomac?

A. We came down to Hampton Roads, and came to anchor again?

Q. Then you anchored twice at Hampton Roads?

A. Yes, sir.

Q. How long did you remain at anchor at Hampton Roads the second time?

A. I should think not more than twenty-four hours. We then weighed anchor, took the schooner Enchantress in tow, and came to Philadelphia.

Q. Whilst you were at anchor at Hampton Roads, did the Albatross have communication with the land by boats?

A. They had communication with the flag ship. I saw some vegetables coming on board.

Q. Did boats pass backwards and forwards from the ship to the shore?

A. Not that I am aware of.

Mr. WHARTON. Will you state, if you please, what was done with Smith when he was first taken by the Albatross?

A. We were taken on board and put in double irons, and put down below, alongside the boilers. They call it the engine room—the passage that goes by the boilers, where the men put their hammocks in the day time.

Q. Is that a warm place?

A. Yes, sir; pretty warm.

Mr. EARLE. What is the relevancy of this?

Mr. WHARTON. It rather expands the evidence in regard to the arrest, which was made a point by the government.

Judge GRIER. I see nothing in it. What has it to do with the case?

Mr. WHARTON. Perhaps I can indicate some connection.

Judge GRIER. Very well.

Mr. WHARTON. The indictment contains an averment that this defendant was first brought into this district, and was apprehended here. In order to prove that averment in the indictment, the government brought up the deputy marshal to show that he took a warrant to the navy yard, and arrested him there. Our purpose is to show that he had been arrested, and put in irons long theretofore. We propose to show that he was not first brought into this district, but into another district.

Judge GRIER. What have the handcuffs to do with it? If he had been taken to Baltimore and landed, or to any other place and landed, there might be something in your point; but it is not affected by the fact that a naval officer put irons on a man charged with piracy.

Mr. WHARTON. The word is "apprehended," not "arrested."

Judge CADWALADER. That is the alternative; but the jurisdiction is not rested by the United States in this case on the place where the person was apprehended, but on the district into which he was brought. He was on board the Albatross, I suppose, as a prisoner of war; and from that custody, as I understand the tendency of the testimony, he was handed over to the civil authorities. The question then is whether the Court has jurisdiction. There are two alternatives as to the jurisdiction: one, depending on the place where the man is apprehended, which we will not prejudge the point by saying does not apply to a capture of this sort, but may not apply to it; and the other, depending on the district into which he is first brought. Now, how is either of those points affected by the manner in which he was treated while in custody?

Mr. WHARTON. The particular mode of treatment is perhaps not so important upon the legal question; but as there was some testimony from the witnesses of the government with respect to the condition of the party, this was intended to show the point of time from which that condition should date. I shall not press it.

Mr. HARRISON. I do not know how far we shall be at liberty to avail ourselves of any objection to the rulings of your Honors on any point in this case; but still I respectfully ask that your Honors will note our objections to the points which have been raised and overruled.

Judges GRIER and CADWALADER. Certainly.

Mr. WHARTON (to the witness.) Mr. Rochford, at the time and before the period of Smith's shipping on board the Jeff. Davis, were the United States' courts open in Savannah and Charleston?

The WITNESS. No, sir—

Mr. KELLEY. Stop We object to that.

Judge GRIER. It is a fact that every one knows. The proclamations of the President show it.

Mr. WHARTON. The witness says that in point of fact the courts were not open and the United States' officers were not performing their functions there.

Judge GRIER. The judges had resigned before that time in both South Carolina and Georgia.

Mr. WHARTON (to the witness.) How long had you known Smith, either personally or by reputation, before you started in June on this voyage?

A. I have known him for four years, by coming into Savannah in the fall of the year from Liverpool, and going back in the spring.

Q. Did you consort with him so as to know about him?

A. Yes, sir. I have conversed with him many a time about seafaring business.

Q. Had he a fixed home there?

A. Yes, sir. He had a wife, and one boy, fourteen years old, who went to New York some twelve months ago, to get his education.

Q. You have stated that he was a pilot: was that his regular occupation?

A. Yes, sir, that was his profession—a full branch pilot of the Savannah river.

Q What was his reputation—that of an orderly, quiet, law-abiding citizen, or otherwise?

A. He was an honest citizen of Savannah, a native of the place, as I understood.

Q. Was he a peaceable, quiet man?

A. Yes, sir. I had an opportunity of knowing him because I stayed there in the winter time, and worked in a cotton press and saw him pass regularly once or twice a week.

Q. You have heard others speak of him?

A. Yes, sir.

Q. Was that the manner in which he was held and reputed by people generally about the town?

A. Yes, sir. I never heard of his getting in any difficulty.

Cross-examined by Mr. ASHTON.

Q. Was Smith on board the Jeff. Davis when you went on board?

A. He arrived just one day before me.

Q. Do you happen to recollect what day of the month it was, and in what month?

A. It was on the 8th of June that I arrived.

Q. In what capacity did you find Smith on board that ship?

A He was acting as boatswain of the vessel.

Q. What were the duties of that office?

A. The occupation of a boatswain is to teach a man's work if a man does not know how to do it as a mariner. A man cannot fulfil the duty without having some understanding of seafaring business.

Q. What day did the vessel leave Charleston harbor?

A. On the 28th of June.

Q. Then from the 8th of June to the 28th of June, Smith was on board that vessel in the harbor of Charleston?

A. Yes, sir, fitting her out for sea.

Q. Was William Smith in confinement on board the ship during that time?

The WITNESS. Do you mean handcuffed?

Mr. ASHTON. I mean physical restraint of any kind. Was he confined in the cabin?

A. No, sir; but he was confined in this respect: that neither he nor any man on board the Jeff Davis could go ashore without getting permission from the captain. There was a sentry of marines on the gangway, and your business had to be known, and you had to get permission from the captain to get ashore, or to come aboard.

Q. Were the officers allowed to go on shore?

A. Not without permission from the captain.

Q. Were the ordinary sailors of the vessel allowed to go on shore?

A. No, sir.

Q. During the days the vessel lay as you have stated in Charleston, do you or do you not know that William Smith went ashore?

A. Not to my recollection.

Q. Do you know that he did not go ashore?

A. The vessel was small, and he held a situation from which a man could miss him very readily; and, as far as I recollect, he did not go ashore.

Q. But you do not say positively that he did not go ashore?

A. I cannot say that; but I had a good opportunity of missing him out of the vessel. No officers went ashore while I was there except the captain, not even the first lieutenant or second lieutenant, according to my recollection.

Q. Was the letter that you spoke of as having been read on board the Jeff. Davis, read in the harbor of Charleston during your stay there?

A. Yes, sir. Some dispute got up among the men, and Coxsetter called them all out, and read the letter of marque. He was by the side of Dr. Babcock.

Q. Did that proclamation or any announcement made on board the vessel during this time speak of the prize money that you were to get?

A. No, sir.

Q. Was there any arrangement in regard to prize money?

A. Well, I heard some mumbling among the men about it, but not from the officers.

Q. What proportion of prize money were the men on board the Jeff. Davis to get?

A. I hardly recollect now. They were talking about some a quarter of a share, and some half a share, and so on, according to the situation each man occupied on board the vessel.

Q. Then the boatswain was to get more than the common sailor?

A. I never heard any thing mentioned about the officers.

Q. How long were you going from Charleston to Savannah.

A. One day.

Q. How long did you lie in the harbor of Savannah?

A. I was not on board the vessel at Savannah. I came from Savannah to Charleston.

Q. Was that document read in Charleston or Savannah?

A. In Charleston harbor.

Q. Where did you go when you left Charleston?

A. To sea.

Q. When did the vessel go from Savannah to Charleston?

A. The vessel did not go to Savannah. We joined her in Charleston harbor.

Mr. Ashton. I thought you said you joined her at Savannah?

The Witness. In Savannah, we arranged to go, and joined the vessel at Charleston.

Q. You saw Smith on board the Jeff. Davis on the 8th of June: where did you see him last before you saw him then?

A. In Savannah.

Q. How long before?

A. About the 5th or 6th of June, I saw him there.

Q. You were in Savannah on the 5th or 6th of June, and on the 8th you went from Savannah to Charleston?

A. Yes, sir, on the cars.

Q. So far as you know, then, William Smith went from Savannah to Charleston voluntarily?

A. No, sir, I will not say that. He did not go voluntarily. The laws of the Southern States—

Mr. Ashton. Never mind about the laws.

Mr. Wharton. The gentleman asks whether he went voluntarily. We are entitled to the answer.

Judge Grier. The counsel has a right to put the questions as he pleases, but the witness has a right to answer.

Mr. Ashton. I withdraw the question.

Mr. Harrison. I object to its being withdrawn after the witness has commenced to answer it.

Mr. Wharton. It seems to me it is part of the proper answer to the question to show how he went and why he went.

Judge Cadwalader. After the full warning which the early examination gave as to the tendency of this question, I think it ought to have been withdrawn before it was withdrawn, or else the witness ought to be allowed to complete his answer. I suppose that in strictness the counsel for the United States can withdraw the question, though it may have been partly answered. At the same time, as it was put advisedly, after the full nature of the subject had been developed and discussed, I think it would be taking a very strict advantage of their legal right not to allow the question to be answered.

Judge Grier. (To the witness.) You said he was compelled to go. Give us the full answer.

The Witness. I was asked whether Smith came voluntarily or not. I say every man was compelled to join the army or navy; and he being acquainted with sea life, like every seafaring man, thought it better to go in the navy than the army.

Mr. Ashton. Mr. Roehford, did you see anybody take him from Savannah to Charleston?

A. I did not see anybody take him; but I saw him in Savannah with a valise in his hand, on the hotel piazza.

Judge Grier. And from that you concluded he was compelled?

A. No; but by the laws of the Southern States——

Judge Grier. Oh! never mind!

By Mr. Kelley:

Q. I understood you to say that Smith joined this vessel at Savannah?

A. No, sir; I did not say that. The vessel could not be at Savannah and in Charleston harbor at the same time. He joined the vessel at Savannah, to go on board of her at Charleston.

Q. You mean that he shipped in Savannah?

A. Yes, sir.

Q. And he went to Charleston by railroad?

A. Yes, sir.

Q. Did the whole crew go together?

A. The greatest portion of them did. The remainder were in Charleston before.

Q. Are you a citizen of the United States? Have you ever been naturalized?

A. I never had my papers. The first time I came to the United States I was under age, and I had no occasion to get papers.

DANIEL MULLINZS called and sworn, and examined by Mr. Harrison.

Q. Of what place are you a native?

A. Charleston, South Carolina.

Q. Are you acquainted with the defendant, Smith?

A. Yes.

Q. Of what State is he a native?

A. I believe he is a native of South Carolina, but a citizen of Savannah, Georgia.

Q. How long has he been a citizen of Savannah?

A. I do not know. He served an apprenticeship there in a Savannah pilot boat. He must have been there when very young.

Q. Then he has been a resident of Savannah for several years, to your knowledge?

A. Yes, sir.

Q. Was he a resident of Georgia at the time of the passage of the secession ordinance of Georgia, and the formation of the Southern Confederacy?

A. Yes, sir.

Q. Was he a housekeeper, and the head of a family, in Savannah?

A. Yes, sir.

Q. What was his occupation?

A. A full branch Savannah pilot.

By Mr. WHARTON.

Q. Does it not require previous training and education, to become a full branch pilot?

A. Yes, sir; a servitude of years. From one grade you rise to another, from twelve to fourteen, sixteen, eighteen feet, to full.

Q. According to the draft of water of the vessels you pilot?

A. Yes, sir. You have to serve an apprenticeship according to that, and to be a citizen.

Q. How far is sobriety a necessary quality?

A. That is required.

Q. How far is honesty requisite?

A. That also. He has to give security as regards conduct.

Q. You knew him in his occupation and profession as a pilot?

A. Yes, sir, for many years.

Q. What did people generally say of him, who knew him?

A. I never heard anything spoken against him?

Q. How was he reputed, generally? How did he stand with his neighbors, with those who knew him?

A. They all seemed to like him well.

Q. He was a peaceable, quiet man?

A. Yes, sir. He was connected with the vessels of Northern men more than those of Southern men. There are more Northern and European vessels in those waters than Southern vessels.

Q. Were you acquainted with his family in Savannah?

A. No, sir.

Q. Had he parents or grandparents living?

Mr. KELLEY. He had them some time, no doubt.

The WITNESS. I think they lived in South Carolina.

Mr. WHARTON. I do not want to go too far, but to show that the man had connections there.

The WITNESS. I knew a Mrs. Smith on Sullivan's Island, South Carolina, who is either his aunt or his grandmother.

No cross-examinaton.

Mr. HARRISON. We are through with our oral testimony, but I understood your Honors to allow us until to-morrow to make a note of the various documents to be referred to.

Judge GRIER. I suppose so far as matters of history are concerned, such as the dates of the various secession acts of the States, you can take them from any book you please.

Mr. WHARTON. We should like to put these matters in as evidence, so that the history may be fixed here.

Judge GRIER. Make a brief in writing of the documents you want in, and hand it to us in the morning. Have we the case on both sides?

Judge CADWALADER. Is there any rebutting testimony for the prosecution?

Mr. ASHTON. No, sir.

The Court adjourned till to-morrow.

THURSDAY, *October* 24, 1861.

Mr. HARRISON offered the list of documents alluded to yesterday, viz.: Proclamation of marque and reprisal of President Davis, of the Confederate States; the Constitution of the Confederate States; the Inaugural Address of President Davis; a synopsis of the Confederate States Army Bill; the secession ordinances of South Carolina, Alabama, Georgia, Louisiana, Florida, Mississippi, Texas, Virginia, Tennessee, Arkansas, and North Carolina, respectively; the Act of the Confederate Congress of May 6, 1861, recognizing a state of war between the United States and the Confederate States; President Davis' Message to the Confederate Congress, April 29, 1861; Instructions for Privateers, by order of the President of

the Confederate States; and the Proclamations of Governor Letcher, of Virginia, and Governor Ellis, of North Carolina, as contained in Moore's Rebellion Record.

Judge GRIER. These papers are not received as evidence of any fact except the fact of their own existence.

MR. EARLE proceeded to sum up for the Government:

With submission to your Honors, Gentlemen of the Jury, it is a matter of contrast which must strike every mind who glances at the mode of procedure here in our courts, and the mode of procedure in other places where a government rival to our own has been set up, and it is a matter, also, of pleasure, that we go on in this court tranquilly, without disturbance, in the midst of general wreck and ruin which surround us, and administer justice quietly and deliberately, and that the prisoner at the bar will have as fair a trial at the hands of his countrymen, will have justice as fairly meted out to him by the Court and by the Jury, as if the tranquillity which existed four years ago, now prevailed in our midst. He can complain of nothing but the fairest treatment, even on the part of those whose duty it has been to prosecute him. It must have struck you, in the course of the trial, that a great deal of the matter which has been offered by his learned and able counsel, might have been ruled out on different technical grounds; but that was not the desire of the government, nor of the prosecuting officers. The desire was that this man should have, in every sense, a fair trial, and that that conviction of which we felt assured in redress of the violated and injured law of the country, should stand on so broad and sol'd a basis, that there could be no objection taken to its having been secured by any sharp technical point, but that it would stand as an adjudication of this court, on an offence of a high national character, in a great and important State trial.

The evidence is so simple that it would seem to be a matter of no necessity for me to recapitulate it to you. The cardinal facts are undisputed. If such a thing were known in criminal proceedings as an admission in the shape of a case stated, we might take even the facts as detailed by the defendant's own witnesses, write them down, let you find them as a special verdict, and let the Court pronounce their opinion on it as a matter of law.

In the first place, gentlemen, the defendant is a citizen of the United States. He cannot divest himself of that allegiance which he owes to the United States. It appears by the testimony that he was born in the State of South Carolina, and resided in the State of Georgia; but he is a citizen of the United States, and can never divest himself of that allegiance, in law, without the consent of the United States. Certainly, I may state that doctrine without limitation, so far as the purposes of this trial are concerned. He being such citizen, let me briefly call your attention and that of the Court, to an act which shows what Congress has thought of his conduct in this case:

"If any citizen shall commit any piracy or "robbery aforesaid, or any act of hostility "against the United States, or any citizen "thereof, upon the high sea, under color of "any commission from any foreign Prince or "State, or on pretence of authority from any "person, such offender shall, notwithstanding "the pretence of any such authority, be "deemed, adjudged, and taken to be a "pirate, felon, and robber, and on being "thereof convicted, shall suffer death."—*Act of April* 30, 1790, § 9; *Brightly's Digest Laws U. S., p.* 207. § 29.

The other acts, I may advert to presently. It appears in evidence that the prisoner voluntarily went from Savannah to Charleston to go upon the expedition. It appears, on his own allegation, that he exercised his volition in that act. There was no constraint; there was no compulsion: but even if there were, it would be no defence, because it was held by Mr. Justice Washington, in the case of the United States *vs.* Jones, (3 Washington's Circuit Court Reports, p. 209), that no orders from a superior officer will justify a subordinate in the commission of what the latter knows or ought to know to be piracy; all who are present acting or assisting in the offence, are deemed to be principals. Therefore, when he took his valise and proceeded in the railroad car from Savannah to Charleston, with the other parties forming the expedition, doubtless in high spirits, doubtless without a thought on his mind of that which has been set up here in his behalf, perhaps as an evasion, perhaps as an after thought, that there was the least compulsion or control upon him in doing this—when he did it, he did it under the law of his country as a voluntary act, of which he must take all the consequences. He took the risk of capture, for the profit that he might make. He took the risks of the expedition, and he can blame nobody but himself, for the consequences which his own act has brought upon him.

The offence with which this man is charged, has been condemned by almost every legal writer, and certainly by every moralist who has ever written on the subject. Dymond, Paley, others that might be cited, have said that privateering, (taking this offence in the lenient way contended for by the defendant's counsel) is the most cruel part of warfare, when legitimate and when recognized, and is the meanest part of it, under any circumstances, be it legal or illegal. The privateer is supposed to be less animated by the spirit of patriotism, misguided or proper, than any other man. He starts on the expedition as a kind of Jerry Sneak of the ocean, if I may use the expression. He starts, not for the purpose of carrying on war in the most

effective way, but for the purpose of filling his own pocket. He preys on the commerce of innocent people, property owned, perhaps, by widows and children afar off, whom he never knew, who, perhaps, might agree in sentiment with him on the very difficulties existing. He starts on the ocean to seize their property, to pillage their ships, to inflict on them the worst effects and sufferings of piracy. It may be that the privateer comes across a poor sailor returning from a voyage to China, or to the North or South Pole, who started years ago in a time of peace and tranquillity. A poor sailor who sailed, perhaps, on a whaling voyage at the commencement of the administration of President Buchanan, now returning after four years' absence from his family, is met by the *Jeff. Davis*, a shot fired across the bow, and the poor whaler brought to, and to his astonishment, the first question is, "Did you not know that war had broken out in the United States?" He knows of no such thing. If a messenger had come from Heaven, he could not believe it in view of the state of affairs which prevailed four years ago. He is brought to, his cargo of whale oil is taken from him, and after four or five years' of suffering in the frozen regions of the North, he finds himself a penniless, ruined man at the hands of the very scum and off-scouring of Southern cities, poured on the ocean to sweep the commerce of poor and suffering working people of the North, from that ocean, by acts in law and in morals, piratical. Privateering has been condemned, and it has been proposed, time after time, by civilized nations, to abolish it, and I believe that latterly our Government has consented to its abolition. It has been proposed to abolish it, because it was non-effective in war, because it was destructive and injurious to innocent parties, and because it had no savor of Heaven about it in any way or in any light; and how any good man could engage in it, be the quarrel what it might be, would be exceedingly difficult to understand, because it inflicts ruin on the innocent.

The evidence shows you that a citizen of the United States embarks in this nefarious business; and what is the defence? There has been a great deal of legal fencing here. A great many questions have been asked, which must have struck you as wholly immaterial. The materiality of them consisted entirely in the fact that they were sharp legal points. They had no relation to the case. All those points fell to the ground, owing to the vigilance and preparation of the acting District Attorney. He met each and all of them, and foiled them all But the defence that I understand to be set up—and which will be alluded to more particularly by my learned colleague, who is to follow me—is that this man acted under some paper authority. The answer to that is simply this: that in all the decisions to which I shall allude, and which will be alluded to more fully by Judge Kelley, it has been uniformly held that this defence of a piratical act is not good unless it is done, *bona fide*, under a commission. Hence, to that defence which may be set up, mark my plain and honest reply:—that the commission must be issued *bona fide*, and must be acted on *bona fide*. The reply—and there is the nut shell of the case—is that as allegiance is owing by the citizen to the United States, and as he is presumed to know the law of the United States, he cannot shield himself under a commission issued to plunder the United States; no commission to rob his own countrymen can be *bona fide;* but such an excuse is an aggravation of the offence in law and in morals. A man brought before this court on a charge of contempt, might just as well put in an answer denying the power of the court and saying that he refused to obey or execute the mandate of the court, which would only be aggravation, like the excuse of the clown who struck the King, and apologised to his majesty by saying he thought it was the Queen. Meeting that point at the outset, by the answer which strikes me as the hinge of the whole case, I will call your attention very briefly to the facts.

The defend nt, Smith, leaves the port of Charleston, on board this piratical vessel. She makes different captures. She meets the *Enchantress* My learned friend, Mr. Harrison, I believe, asked if any more violence was used than was necessary to effect her capture. Certainly, it would have been unnecessary to use unnecessary violence. These engaged in the capture would not fire into and destroy property which they were about stealing. But the language of the courts on that point is very simple. In the case of the Malek Adhel (2nd Howard's Reports, 210), the Supreme Court of the United States, decided that by the words "piratical aggressions" in the act of 1819, were meant such offences as pirates are in the habit of committing, whatever the motive, whether plunder, revenge, hatred, or wanton abuse of power; and consequently that actual plunder or intent to plunder, need not appear to bring the case within the compass of the act, any piratical aggression, search, restraint, or seizure being sufficient. It was decided in the case of the United States *vs.* Tully (1 Gallison's Reports, 247), that there need be no personal violence to constitute piracy, within the 9th section of the act of 1790. If the intention of taking or stealing, the *animus furandi* appears, it is sufficient. Of course, that disposes of the whole question, whether the crew of the *Enchantress* yielded to reasonable fear of violence or not. They looked over to this vessel and saw the motley crew armed to the teeth. They were not required to commit any act of insanity, let the insanity in any portion of our country, be what it may, as his Honor Judge Grier suggested. We are not to suppose the whole human race are mad. The crew of the *Enchantress* were not to wait to be blown out of water. Mark the conduct of the defendant at this juncture. It is set up here that he

was innocent in this matter, that he had no wrong intention, that he was the victim of compulsion; and laws of some Southern States which have no relevancy to the matter, have been referred to, which could only be offered to sustain some such theory as that Smith was an unwilling actor in this transaction. The whole evidence shows the reverse. Look at his conduct towards the colored man, as an example. He had been sent from the *Enchantress* to the *Jeff. Davis*, but was brought back in the boat with Smith. He was asked "why have you brought him along?" What is the answer? Why, "we will take him to Charleston, where he will bring $1500,"—an offence against the law of South Carolina, an offence against the law of Georgia, and an offence without feeling, because to tear a man from his home and enslave him forever, against the usages of warfare, stamps this transaction just in the light in which I wish you to look at it in all truth, and fairness, and honesty. It was a piratical, outrageous aggression, without any of the color or the forms of law, like other piratical expeditions of Kyd and such men in earlier days; but it had this distinction, that those men pretended not to attack the vessels of their own country, though they did sometimes make mistakes, as they gravely tell us, and did seize and run down a vessel of their own country, and after she had been sunk they were very unhappy to find that they had committed a mistake! The United States do not pretend to say that these men are pirates in that light. We say, and we believe the court will sustain us in it, that under the laws of the United States, the offence of this man is piracy, that the act committed is piratical under the laws of the United States, and that the punishment meted out to it is the same as that of piracy, under the law of nations. You would not say that the slave trade carried on upon the coast of Africa was piracy. So, in this matter, we submit that this is a case of piracy in the legal sense.

Before proceeding further, I may call the attention of the court, very briefly, to a case which is very much like this indeed, where similar piratical acts where committed—the case of the United States *vs.* Klintock, 5 Wheaton's Reports, p. 144. In the syllabus it is stated:

"Under the particular circumstances of "this case, showing that the seizure was made, "not *jure belli*, but *animo furandi*, the com- "mission was held not to exempt the prisoner "from the charge of piracy."

"The act of the 30th of April, 1790, c. 36, "p. 8, extends to all persons, on board all "vessels, which throw off their national "character by cruising piratically, and com- "mitting piracy on other vessels."

The facts appeared to be that the prisoner was a citizen of the United States, that he sailed as first lieutenant on the *Young Spartan*, a vessel owned without the United States, and cruised under a commission from Aury, styling himself Brigadier of the Mexican Republic, and Generalissimo of the Floridas, granted at Fernandina, after the United States government took possession of it. The prisoner was convicted in the court below, and his counsel moved in arrest of judgment, upon various grounds, one of which is "that Aury's commission exempts the prisoner from the charge of piracy." Chief Justice Marshall, delivering the opinion of the court, said:

"So far as this Court can take any "cognizance of the fact, Aury can have no "power, either as Brigadier of the Mexican "Republic, a republic of whose existence we "know nothing, or as Generalissimo, of the "Floridas, a possession of Spain, to issue "commissions to authorize private or public "vessels to make captures at sea. Whether "a person acting with good faith under such "commission, may or may not be guilty of "piracy, we are all of opinion that the com- "mission can be no justification of the facts "stated in this case."

If our courts were so particular as to a commission executed by a foreign power, how little would they recognise a commission which aimed a blow at the very existence of our government, and which aims a blow at the very existence of this court, which sits only by virtue of the power conferred on it by the United States?

I may in this connection call attention to the fact that by the Constitution the power of issuing letters of marque and reprisal, is confined exclusively to the Congress of the United States. Our government recognises no other power to do that; nor has it abdicated the very function of government within its own limits. I will call your Honors' attention to the case of Rose *vs.* Himely, in which the court said: (4 Cranch's Reports, p. 272.) "It is for govern- "ments to decide whether they will consider "St. Domingo as an independent nation, and "until such decision shall be made, or France "shall relinquish her claim, courts of justice "must consider the ancient state of things "as remaining unaltered, and the sovereign "power of France over that colony as still "subsisting." All this applies with ten-fold force, when you consider that these are adjudications in reference to other nations, but that in the case now before you the point rises to the dignity of the national existence, and the question involves the recognition of the right of a portion of the country to revolt and destroy the government.

I do not say that this is piracy at common law, but piracy under the acts of Congress, under which the defendant is indicted. You will find on the back of the indictment a reference to the acts under which he is indicted.

Mr. Harrison. Will you please tell me whether you proceed under all the statutes or under the one specified by the District Attorney? He specified the 3rd section of the act of 1820.

Mr. Earle. I will read that section as it has been mentioned:

"If any person shall, upon the high seas, "or in any open roadstead, or in any haven, "basin, or bay, or in any river where the sea "ebbs and flows, commit the crime of rob- "bery, in or upon any ship or vessel, or upon "any of the ship's company of any ship or "vessel, or the lading thereof, such person "shall be adjudged to be a pirate."

Under this act and the act of 1790, to which I have before referred, this indictment is drawn. I shall take up none of your time, gentlemen, in talking about the facts. The testimony of the defendant makes out the case. It is not denied that he was there: it is not denied that he did the act. Some questions were asked his witnesses in regard to his character What is the honest man, what is the man of character doing on the high seas, taking other peoples' property against the law? He assisted in several captures; after the *Enchantress* was captured, he was put on board as prize master, and he took her away. We show that he committed these acts. What is the reply? That he was an honest man. Has the reply any coherence or sense in it? What is the man of character doing in such company? What is he doing on such an exploit? If he fired the gun, does the fact of his previous honesty lessen the crime? Does it not aggravate it? Besides, do we not know how men of character fall? Do we not know how, prior to the commission of murder, Dr. Webster had a good character? Do we not know that one of the weaknesses of human nature, against which we are all to guard, is that men of the brightest character fall into crime? I do not suppose the defence was urged seriously, and so waste no time upon it.

I have not taken up your time, gentlemen, in going over the facts, because they are undisputed. There can be no question about them. My friend, Judge Kelley, will notice the law more particularly, in reply to the learned gentlemen on the other side. In conclusion, let me hope that your verdict will be such that the law will be a redress, that you will perform your duty in that spirit of firmness, moderation, and justice, which should ever characterize a jury in our community; that while you mete out justice to the prisoner under the charge of the court, you will also reflect that the interests of the community are in your hands, that the interests of the government are in your hands; and whilst you acquit him, if you can under the evidence and the charge of the court, if you have a fair, reasonable doubt of his guilt, if you feel that doubt conscientiously and scrupulously, yet, if under the charge of the court, and under the superabundant evidence in this case, you believe him to be guilty, you will in the same spirit find him guilty.

Mr. Harrison.—If your Honors please, before I proceed with my argument, I desire to furnish the court with some points of law on which we propose to rely.

The points were handed to the court, and are as follows:

First. If the Confederate States of America is a Government, either *de facto* or *de jure*, it had a right to issue letters of marque and reprisal; and if issued before the commission of the alleged offence, the defendant, acting under the authority of such letters, would be a privateer, and not a pirate, and, as such, is entitled to be acquitted.

Second. That, if at the time of the alleged offence, the Southern Confederacy, by actual occupation, as well as acts of Government, had so far acquired the mastery or control of the particular territory within its limits, as to enable it to exercise authority over, and to demand and exact allegiance from its residents, then a resident of such Confederacy owes allegiance to the Government under which he lives, or, at least, that by rendering allegiance to such Government, whether on sea or land, he did not thereby become a traitor to the Government of the United States.

Third. That, if at the time of the alleged offence, and the issuing of the letters of marque and reprisal upon which the defendant acted, the Courts of the United States were so suspended or closed in the Southern Confederacy, as to be no longer able to administer justice and to enforce the law in such Confederacy, the defendant thereby became so far absolved from his allegiance to the United States as to enable him to take up arms for and to enter the service of the Southern confederacy, either on land or sea, without becoming a traitor to the Government of the United States.

Fourth. That, if at the time of the alleged offence and his entering in the service of the Southern Confederacy, the defendant was so situated as to be unable to obtain either civil or military protection from the United States, whilst at the same time he was compelled to render either military or naval service to the Southern Confederacy, or to leave the country; and in this latter event, to have his property sequestrated or confiscated by the laws of the said Confederacy—such a state of things, if they existed, would amount, in law, to such duress as entitles the defendant here to an acquittal.

Fifth. That this Court has no jurisdiction of the case, because the prisoner, after his apprehension on the high seas, was first brought into another district, and ought to have been there tried.

Mr. Harrison. May it please your Honors, and you, Gentlemen of the Jury, it becomes my duty now, to open this case for the accused. I should much have preferred if that duty had devolved upon some one else; not

that I shall shrink from the discharge of it as well as I can; but that I acknowledge my inability to discharge it, as I think it ought to be. I hope I may be pardoned for saying, that I sincerely regret the absence here to day of my learned friend Mr. Coffey; not only upon his own account, but on that of the Government, for I know that he had thoroughly and profoundly studied this case, (and it is to that perhaps more than any thing else, that his recent illness is ascribable) and that he would have brought to bear upon the argument, all the ingenuity, and ability, and research, which a strong mind, and a stout heart, and a clear, capacious, independent, honest intellect, would have placed within his reach. I expected no mercy; I should at least have received justice and fairness at his hands, which is all I ask.

I know, too, that in the argument of this case, I have much to contend with; not only in the skill and ability of the learned counsel who are opposed to me, but more, perhaps, if any thing, in the excited condition of the public mind, and in the popular prejudice and prejudgment, which, in surrounding the questions now before you, may be said to surround even the prisoners themselves. Of this, however, I shall not complain. I have no right, in fact, to complain of it. At a time like this, that man must be something more, or something less than man, who could divest himself entirely of every thing in the shape of prejudice. It is only when prejudice usurps the place of reason, and turns a deaf ear to fact as well as argument, that the trial by jury becomes a farce, and that jurors simply meet, not to deliberate and to determine, as they ought to do, and as I think you will; but to render a foregone conclusion This is not the prejudice, I am sure, which I shall have to encounter at your hands. If it be a prejudice at all, like the Ghost in Hamlet, it is an honest prejudice, gentlemen, and I shall meet it honestly. I shall meet it as a man, who asks nothing and expects nothing, and who is entitled to nothing at your hands, but a fair and impartial trial This much I do ask, however, and this much I shall expect to receive, as well upon your own account, as that of the prisoner.

Gentlemen, we have met here to day, for the first time, and under circumstances of no little embarrassment and responsibility; their honors to expound the law, you to judge of the facts of this case, and I, it may be, to argue both of them, if I choose, and as best as I can. And if, in the course of that argument, I should happen to take any position, or to utter any sentiment which you may not like —I do not know that I shall do so—but if I do,—I appeal to you, gentlemen of the jury, and I appeal to their honors upon the bench, to bear with me notwithstanding, and to hear me out. It is the boasted privilege of the law, that it gives to every man, however humble, or howsoever criminal he may be, the right to be heard by counsel; and nowhere, in my opinion, is that privilege more respected and observed, than in the City of Philadelphia. The fullest possible latitude of free and uninterrupted discussion, was afforded to the learned counsel, who opened the case for the Government; and all I ask is, that a similar latitude of discussion, may be allowed to me.

Gentlemen, before I proceed any further with the argument, I desire to call your attention to a few dates and events, which may possibly have some bearing upon the case On the 20th of December, 1860, the State of South Carolinia, for reasons which are set forth in her Secession Ordinance, but which it is unnecessary to recur to more particularly, declared herself completely separated and withdrawn from the Federal Union. In this she was soon followed, first by Mississippi, then Alabama, then Florida, then Georgia, then Louisiana, then Texas, then North Carolina, then Virginia, then Tennessee, and lastly by Arkansas—leaving in all but 23 of the 34 States (not to mention Missouri and Kentucky and probably Maryland, which are at least divided,) still faithful and loyal to the Union. The rest had all seceded. These States soon framed a Constitution, and soon formed a Government of their own, and entered into a social, and political compact, called the Confederate States of America. On the 12th of April, 1861, Fort Sumter, one of the national fortifications of the United States, was taken and held by main force, and is still held by main force, by the State of South Carolina. This was followed by the President's Proclamation of the 15th of April, declaring South Carolina, and the other States which had seceded, to be in a state of insurrection or rebellion; and ordering out the Militia, to the number of 75,000, (and afterwards, and by a similar proclamation of the President, the Naval force of the Government, was ordered out also) for the purpose of repressing it. On the 19th of April, 1861, by an order of the President to that effect, the States of South Carolina, Georgia, Alabama, Mississippi, Louisiana, Florida, and Texas, were declared to be in a state of blockade. And, on the 29th of the same month, and by a similar order of the President, this blockade was declared to be extended to the States of North Carolina and Virginia. Subsequent to all this, other military Proclamations and preparations were from time to time issued, and made by the President, all of which, it is proper to add, have since received the sanction and concurrence of the Congress of the United States.

So much for the proceedings on the part of the United States. But in the meantime,

gentlemen of the jury, the Southern Confederacy has not been idle. Through its President, Mr. Davis, it has issued its proclamations from time to time. It has elected its senators and representatives. It has twice convened its congress, and adjourned it. It has organized a fleet and army. It has voted supplies of men and money. It has declared war, and carried it on; amongst the recognized, and not unfrequent modes of civilized warfare, it has authorized the issuing of letters of marque and reprisal by its President, and they have been issued by that President, and it was under, and by virtue of a commission of that very description, that this man was acting, at the time he was captured by the Albatross and brought here to be tried before your honors, upon a charge of piracy. And the question now submitted to your honors and to the jury is: whether he is protected at all, and how far is he protected by that commission? Is he a privateer, or is he a pirate? Is he a pirate, and thus shut out from all law, and entitled to no mercy either at your hands, or at the hands of any one else, (for that is the condition of the pirate,) or is he simply a privateer, and, thus, according to the law of nations and to the usages of all civilized warfare, entitled to be dealt with as a prisoner of war merely?

Now what is a pirate? A pirate, (says Hawkins,) is he who commits some act of robbery or spoliation on the high seas, which, if committed upon land, would amount to a felony there. (Hawkins, b. 1, ch. 20, s. 3.) He is *hostis humani generis*— He is out of the pale of all social as well as municipal comity or protection; and he is liable to be captured any where, and at any time, and by the private, as well as public, vessels of every nation. This is the common law definition of a pirate; so that the prisoner here, if a pirate, and if any act of piracy is proved upon him, is not only an offender against the laws of the United States, but he is an offender against the law of England, and against the law of France, and against the law of all civilized as well as christianized humanity, both here and elsewhere. On the other hand, if he be not an offender against England, and France, and other nations, and if he could not be captured and punished, by England, and France, and other nations, no more is he an offender against, and no more could he be captured and punished (at least piratically speaking) by, the Government of the United States; because a pirate in one place, is a pirate everywhere, or not at all.

But the Constitution of the United states has authorized Congress to define piracy, and Congress, by the 3d section of the Act of 15th of May, 1820, (which is admitted to be the foundation of this indictment) has thus defined it: "If any person shall upon the "high seas, or in any open roadstead, or in "any haven, basin, or bay, or in any river, "where the sea ebbs and flows, *commit the* "*crime of robbery* in or upon any vessel, or "upon any of the ship's company of any "vessel, or the lading thereof, such person "shall be adjudged to be a pirate; and being "thereof convicted, *before a Circuit Court of* "*the United States, for the District into which* "*he shall be brought, or in which he shall be* "*found, shall suffer death.*" This statute, however, does not do away with the distinction between a privateer and a pirate. It simply declares when a citizen of the United States or other person shall be deemed to be guilty of piracy; but it does not say, and it could not say in fact, whether the prisoner here is a privateer or is a pirate; whether he is a citizen of the United States, or a citizen of the Southern Confederacy, to the extent at least of protecting him against a charge of piracy. This statute, I submit, was not intended to abolish privateering, or to place all privateers upon the footing of pirates; nor could it, in fact, have done so had it so designed. That is a matter for international compact; for public treaty between nation and nation; not for private or municipal legislation. And when the United States, in 1855, was appealed to by France and England to abolish privateering by matter of treaty, she declined to do so. Certainly, so far as foreign nations are concerned, the United States would be estopped from taking the ground that her congress has abolished privateering. And whether the Southern Confederacy is simply still an integral portion of the Union, or whether it is a separate and independent government of its own, *de facto* if not *de jure*, to the extent at least of protecting it against a charge of piracy, is one of the very grounds of the defence, and is a question upon which I shall presently ask permission to be heard more fully before the jury. What I say now is, that a pirate, under the statute, is the same thing as a robber at the common law, and, that to constitute robbery at the common law, there must be shown to have been the *animus furandi*, or the felonious as well as forcible taking of the property which is wanting here. The case of the United States *v.* Klintock (5 Wheaton, p. 150,) which was cited and commented on by Mr. Earle, is in fact an authority in our favor for there the distinction between a capture *jure belli* and *animo furandi*, between a *bona fide* belligerent cruiser and a mere freebooter or robber on the high seas, was expressly taken by Ch. J. Marshall, and is the same which is relied upon here.

So much for the common law as well as statutory definition of a pirate. Now what is a privateer? Privateering, as I understand it, is simply a delegation of the war making power of the government, from the government itself to individuals; and a privateer, or at least an authorized or commissioned privateer, is nothing more than a maritime

volunteer, or a commissioned naval warrior, fitted out by private enterprize, and sailing under letters of marque and reprisal from the government under which he sails. This is what I understand, may it please your honors, by the definition of a privateer. He is an enemy, it is true, and is liable to be taken as an enemy and to be dealt with as an enemy, by the adverse nation, and so far he may be said to resemble a common pirate; but he differs from a pirate in this, that he is not the enemy of all humanity; that he is only the enemy of that particular country which he is thus at war with; and above all, that he is entitled, when captured, to all the consideration and protection of an ordinary prisoner of war. He differs in fact in nothing from any other prisoner who may be taken *flagranti bello*. Nay, during a state of actual warfare, even a non-commissioned privateer, may attack and seize the enemy's property, whensoever and wheresoever he may choose, without violating any principle of international law; being responsible only to the sovereignty of his own nation, which may retroactively ratify, and legalize or validate his acts, however unauthorized. For the doctrine and distinctions upon this point, I refer your honors to Phillimore on Int. Law, p. 393. (85 Law Lib. 290-97; Ib. p. 141; Bynk, 2 Q. P. l. 1, ch. 18. Vattel l. 3, ch. 15, S. 229, 1 Kents C. 99. 2 Azuni's Maritime Law, 347. Spelman Glossary in Voce. Pirata, p. 460. Rudley's Civil Law, p. 2, ch. 1, s. 3, p. 127. This, gentlemen of the jury, is the distinction between a privateer and a pirate; and I ask you to bear in mind this distinction, because if the prisoner here be a privateer, he cannot be a pirate; and if a pirate, he is not a privateer. If a pirate, he is guilty of a capital offence against the law, and you ought to find accordingly. If a privateer, he is guilty of no offence against the government, under the issue which you are sworn to try. If a privateer, he is liable, it is true, to be taken and dealt with as a public enemy, or as a prisoner of war, by the proper authorities, but you, at least, as privateer, have nothing to do with him. Your inquiry, and your sole inquiry, gentlemen, is, whether he is guilty or not of the piracy with which he is charged in this indictment? And this depends first, upon the validity or invalidity of the commission of marque and reprisal, upon which the prisoner acted; and, if that should be adjudged to be invalid, then, it furthermore depends, upon the motives of the prisoner in doing the act with which he is charged; upon the situation and condition of the prisoner, at the time he did it; and, above all, upon the reasons which the prisoner had for thinking and believing, at the time, that that commission, whether valid or invalid, was at least sufficient to protect him against the charge of piracy. If valid, there is an end of the case, of course, for the act would then be lawful, or, at least, not piratical; and even, if invalid, if he believed, and if he had reason to believe, and, more especially if he was necessitated to believe, and to act upon the belief, that that commission was a good one, he would be still protected; for, however as a general rule, and in a mere civil point of view, the maxim of the law is, that ignorance of the law is no excuse for any one; yet there are cases, may it please your Honors, (and I shall endeavor to show that this is one of them), in which a well founded ignorance of the law, and a difference of opinion, and a diversity of authority as to what the law is, and even the absence, as in this case, of any positive law or express decision upon the subject, may well exempt, at least from criminal, if not from civil, responsibility I think your Honors will find that there is an abundance of sound reason, as well as good authority, to this effect; and especially is this true, where any element either of physical or of moral duress, where any actually existing danger, or any well grounded apprehension of a danger of a present and pressing character, can be considered as blending with such ignorance; for there one of the main essentials to every contract, which is the free will of the party, is supposed to be wanting. It may be fairly assumed from the evidence, that letters of marque and reprisal were duly and regularly granted by the Southern Confederacy (so far as it had any authority so to grant them) to Captain Coxsetter, of the Privateer *Jeff. Davis;* and if adequate to the protection of Captain Coxsetter, they must be adequate to the protection of the prize crew of the *Enchantress* (one of whom is the prisoner now before you), and who were acting under the same authority. The only question is, whether they were adequate to the protection of Captain Coxsetter, or any one else; or, in other words, whether the Southern Confederacy is not so far a government *de facto*, if not *de jure*, as to authorize, or at least excuse privateering.

If a government at all, may it please your Honors; if an organized and acting government, however wrongful;—if a government either *de facto* or *de jure*, it had an undoubted and admitted right, I apprehend, to issue letters of marque and reprisal, and to establish a system of privateering; for however some writers may have written against it, or however some nations, at different periods, may have imposed restraints upon its exercise, yet privateering, as I understand it, is now recognized and approved, or at least tolerated and sustained, by every nation. Every man (says Vattel) "may, with a safe conscience, fit out "privateers in defence of his country during a "time of war." Vattel, b. 3, ch. 15. s. 229; 2 Azuni, p 347.

But the first question is, whether the Southern Confederacy is not a government *de facto* if not *de jure*, at least so far as to authorize privateering; or at least so far as to exempt its privateers from all the penalties of the crime of piracy?

Now, in the view which I take of this question, it is not very material to enquire into

the doctrine of secession; by which I understand, the right, or, at least, the assumed constitutional right of any state, or of any number of states, in the union, not to revolutionize, (because the right to revolutionize is not disputed), but to secede—that is to say, peaceably to go out of the Union—peaceably to remain out of the Union, and peaceably to form a government for themselves—a government disconnected from, and totally independent of, the Union, if they should find it to their interest, or their honor, or their happiness, so to do; and of which they themselves, of course, must be the judges. This is what I understand by the doctrine of secession; and if that is conceded, all is conceded; if that is admitted by the government, the whole argument of the government falls to the ground, for there is nothing else in fact for it to stand upon. On the other hand, it does not follow, by any means, because the learned counsel for the government deny the doctrine of secession (as I suppose they will,) that they will make out that these men are pirates. Not at all. Even if the doctrine of secession is not admitted, still the right to revolutionize is not denied. The warmest and ablest opponents of secession (Mr. Webster himself not excepted), have not hesitated to admit the right of revolution. In his speech in the Senate of the United States in reply to Mr. Hayne, in 1830, Mr. Webster uses this language. "If the gentleman had "intended no more than to assert the right "of revolution, for justifiable cause, *he would* "*have said only what all agree to.* But I can- "not conceive, that there can be a middle "course, between submission to the laws, "when regularly pronounced constitutional, "on the one hand, and open resistance, which "is revolution or rebellion, on the other. I "say the right of a State to annul a law of "Congress, cannot be maintained, but on the "ground of the *unalienable right of man to re-* "*sist oppression;* that is to say, *upon the* "*ground of revolution.* I admit that there is "an ultimate, violent remedy, *above the con-* "*stitution, and in defiance of the constitution,* "*which may be resorted to, when a revolution,* "*is to be justified.* But I do not admit that, "under the constitution, and in conformity "with it, there is any mode in which a state "government, as a member of the Union can "interfere with and stop the progress of the "general government, by force of her own "laws, under any circumstances whatever." This is the doctrine of revolution, as laid down by Mr. Webster, in 1830, and as contradistinguished from that of secession. It is a principle, I believe, which is not disputed any where, or by any one. It is not so much a gift of the government, as it is a prerogative of the people, and a prerogative which no government upon earth can control or fetter. So true is this, that even a compact by the people, never to revolutionize, at any time, or for any cause, or under any circumstances, would be treated not only as an absurdity but as a *nudum pactum*—and hence it was, that the first articles of confederation (to which Pennsylvania herself was a party) were afterwards superseded, and by that very constitution under which you are now existing. Such is the nature of the right of revolution. It is the right of the few against the many—the right of a minority, to shake off the domination of the majority, in a proper case, and of which the minority themselves must be the judges; for, otherwise, there would be no such thing in practice, as revolution by a minority against the injustice or oppression of the majority. I put this question to the jury: Was it not by an exercise of this very principle of revolution that American independence was first established? We were then in a minority also. We were then in a minority, and a far greater minority, than the Southern Confederacy now is. We had then, all told, only a population of about two millions; whilst that of the Southern Confederacy, as it is said, amounts, at this time, to at least seven millions. We were weaker in men, weaker in money, weaker in credit, weaker in unity, weaker in discipline, weaker, perhaps, in every respect, than the Southern Confederacy now is, and yet we revolutionized notwithstanding. We not only revolutionized, but we succeeded by revolution in establishing the independence of America. And the first Congress which met, after the declaration of independence in 1776 not only claimed to legislate for a government *de facto*, but *de jure*. And even before a ratification of the constitution by the people, and before that constitution in fact was even made, were not letters of marque and reprisal granted by the government of the United States—granted, I say, by the government of the United States, or I should rather say by the Continental Congress of the States, before the government itself was even formed, or before its fundamental law, at least, was ever adopted. Letters of marque and reprisal were first issued and acted on in 1775; but it was not until 1787, that the Constitution of the United States was ratified and adopted by a single State; nor was it completely ratified and adopted until 1790. But in the meantime, the British trade in many places, and especially along the Island of Bermuda, and the Coast of Africa, literally swarmed with American privateers. Nay, the first American flag which was ever hoisted in the service of the Continental Congress, was hoisted here, in this very City of Philadelphia, and on board of a privateer—on board of the privateer, the Alfred, and under the command of John Paul Jones—that same Paul Jones who afterwards spiked all the guns in two forts, and who, but for an accident, it is said, would have burnt two hundred ships at White Haven, in the North of England.

But why do I refer to all this? I simply advert to this to show you that the American

people are the very last people upon earth who ought to object to this doctrine of revolution, or to privateering as an incident to that doctrine; and I do not understand them, as objecting to it. Undoubtedly Mr. Webster did not object to it; undoubtedly the learned counsel who concludes this case for the government, will not object to it. However we may differ as to the propriety or impropriety of its exercise, or as to the practical application of the doctrine, as to the right at least, I am sure, we shall not differ. It is the great, inherent, indispensable, unalienable, political right of self-defence—just as much so, as it is a physical or a brutal law of self-defence for the serpent, when stung, to sting again, or for the worm, when trod upon, to turn and rend you.

Now, gentlemen, I do not want to be misunderstood. I beg you, and I beg my friends the reporters here, who appear to be taking notes of what I am saying, not to misunderstand me, or misquote me. At a time like this, it is as much as a man's liberty, or even his life is worth, to be correctly quoted. I know where I stand, and how I stand, and how I want to stand in this case, and there I mean to stand, come what may of it—but nothing more. I do not stand here as a secessionist, or as the advocate of secession, nor is it necessary in fact, that I should do so. But what I say, and all I say, is, that, admitting secession to be all wrong; and admitting that the Southern Confederacy had no right whatever to revolutionize, still it has revolutionized—it has not only gone out of the Union, but it has taken eleven of the States along with it, and it has left, at least, two more upon the fence top. It has framed a Constitution, and it has formed a government of its own. It has elected a President and Vice President, and all its officers, in all its branches, whether legislative, judicial, or executive. It has organized an army, and equipped a fleet. It has voted supplies of men and money. It has issued treasury notes. It has declared war, and carried it on, and it is still carrying it on, both persistently and effectively. It has recently made an exchange of prisoners with the general government. It has thousands of prisoners still remaining, either in actual custody, or upon parole. It has been recognized, or at least treated by foreign nations, or by some of them, and by England in particular, and even by the United States herself, not only as a belligerent, but as a government. All of this, I say, it has done, and more besides; and having done all this, may it please your honors, would it not be going too far to say, that the Southern Confederacy is not a government? is not a government *de facto*, if not *de jure*? is not a government, at least so far as to authorize privateering, or at least so far as to exempt its privateers, from all the penalties and consequences of being pirates? After the declaration of Lord John Russel, upon the floor of Parliament, that the Southern Confederacy was a belligerent,—after the refusal of the lords commissioners of the admiralty to make any distinction between a Confederate privateer, and a United States man-of-war's man, and after the whole course of the British Government upon this subject, would it now be competent to that government, to treat the privateers of the Southern Confederacy as pirates? I presume not. I ask your honors' attention to the fact too, that, by a regulation of the French Government to that effect, the privateers and other vessels of the Southern Confederacy are permitted to remain unmolested, for the space of twenty-four hours, in any of the ports of France—a space long enough in all conscience, for any ordinary vessel to unload and to effect a clearance. With all deference, too, I might very well refer to the recent ruling of one of your honors in the case of the General Parkhill, as furnishing additional evidence of the pretension of the Southern Confederacy to the character of a belligerent. The ground there taken by Judge Cadwalader was, that Peterson & Stock, of Charleston, being residents of the Southern Confederacy, and that Confederacy being in a state of hostility against the government, that Peterson & Stock, therefore, whether personally loyal or disloyal, had forfeited all claim to national citizenship, and were no longer entitled to any proprietary *status* in a prize court. This I humbly conceived, at that time, and I still conceive, was a virtual recognition by your honor, of the Southern Confederacy as a belligerent. And did not the Congress of the United States, lately allow a claim of several thousand dollars, to the heirs or representatives of Paul Jones? and for what? Why, for the privateering services of their ancestor, during the war of the Revolution; thus recognizing and rewarding as a patriot, that man, whose memory, according to the argument of our learned friends here, ought much rather to have been desecrated with the name of pirate. If this man is a pirate, upon what principle, or by what authority, did the Congress of the United States dare to appropriate one cent to the real or personal representatives of John Paul Jones?

But it is idle to cite authorities upon this point. It is useless to multiply examples to show your honors, that the Southern Confederacy—whether right or wrong, is another question, and is not the question which I have now to deal with, or which I mean to have to deal with before the jury—that the Southern Confederacy, at least practically speaking, is not a political nonentity or abstraction, but is a substantial and effective government. How long it may remain so, is another question. It may be ultimately subjugated. It may soon be stripped of all its pretensions to

the character and position of one of the nations of the earth. But what I say, and what I submit to your honors, is, that, standing as it now does, and where it now is, is it not, I will not say preposterous, but impossible to maintain that the Southern Confederacy is not a government—a government *de facto*, if not *de jure*—a government not in theory only, but in practice—a government of law, of purpose, of policy, of principle, of action, of efficiency—a government of arts and sciences, of agriculture, of manufactures and even of commerce itself, to some extent, crippled and paralysed as it has been, and as it is, by the blockading power of the United States—a government in short, possessing all the attributes, and exercising and exhibiting all the functions, of a thoroughly organized and perfectly systematized body, politic? And if this be not a government, what is? To show what constitutes a government and the different kinds of government, see Puffendorf, b. 7, ch. 2, s. 13, p. 645, and ch. 5, s. 3, p. 670. All government (says Thomas Paine) is the result either of superstition, or of power, or of the common rights of man. All government (says Mackintosh,) with the exception of the United States, (for he makes an exception of this government) is the result more of accident, than of art. If it begin in rebellion, it ends in revolution; but what that revolution is to end in, whether in monarchy, or oligarchy, or aristocracy, or democracy, or what not, it is hard to tell. This is the history perhaps of nine tenths of all governments upon the face of the earth. And with all deference to Mr. Mackintosh, when the American Revolution first started, it would have been pretty hard to determine, whether it was to eventuate in a democratic form of government, or in the establishment of another monarchy. But such, I submit, is the government of the Southern Confederacy; and if it be a government at all—whether just or unjust, rightful or wrongful in its inception—if it be a government either *de facto* or *de jure*,—then I humbly submit to your Honors, that neither at common law, nor under the statute, nor according to the law of nations, can this prisoner be adjudged to be a pirate.

I will now ask permission of your Honors, to cite a few authorities on this subject and I will tell your Honors, by and by, why it is that I refer to them. I refer in the first place to "Rawle on the Constitution," page 292. "*If* (says Mr. Rawle) *the majority* "*of the people of a state d liberately and* "*peaceably resolve to relinquish the republican* "*form of government, they cease to be members* "*of the Union.*" And then at page 295, "*The secession of a state from the Union* "*depends on the will of the people of such* "*state.*" And again at page 296, "But in "any manner by which a secession is to "take place, nothing is more certain, than "that the act should be deliberate, clear, "and unequivocal. The perspicuity and "solemnity of the original obligation require "correspondent qualities in its dissolution. "The powers of the general government "cannot be defeated or impaired by an ambiguous or implied secession on the part "of the State, although a secession may be "conditional. The people of the State may "have some reasons to complain in respect "to acts of the general government—they "may in such cases invest some of their "own officers with the power of negociation, "and may declare an absolute secession in "case of their failure. Still, however, the "secession must in such cases, be distinctly "and peremptorily declared to take place on "that event, *and in such case—as in the case* "*of an unconditional secession, the previous* "*ligament with the Union, would be legiti-* "*mately and fairly destroyed. But in either* "*case the people is the only moving power.*" This was from a gentleman of your own city, a gentleman of acknowledged ability and unblemished public, as well as private, character in his day, and who held the same high office under Washington himself, which my learned friend, Mr. Coffey, now holds under President Lincoln.

I refer next to the appendix to the Virginia edition of Blackstone's Commentaries, published by St. George Tucker, in 1802, and from which I also have permission to read a few extracts. (See 1st Tucker's Blackstone, page 73, s. 13.) "The dissolution of these systems happens, when all "the Confederates, by mutual consent, or "some of them, voluntarily abandon the "confederacy, and govern their own States "apart; or a part of them form a different "league and confederacy among each other, "and withdraw themselves from the confederacy with the rest. Such was the "proceeding on the part of those of the "American States which first adopted the "present Constitution of the United States, "and established a form of federal government, essentially different from that which "was first established by the articles of "Confederation, leaving the States of Rhode "Island and North Carolina, both of which, "at first, rejected the new Constitution, to "themselves. This was an evident breach "of that article of the confederation, which "stipulated that those 'Articles should be "'inviolably observed by every State, and "'that the Union should be perpetual; nor "'should any alteration at any time here-"'after be made in any of them, unless "'such alteration be agreed to in the "'Congress of the United States, and be "'afterwards confirmed by the legislature "'of every State.' Yet the seceding States, "as they may be not improperly termed, "did not hesitate, as soon as nine States "had ratified the new Constitution, to supersede the former Federal Government, and

"establish a new form, more consonant to "their opinion of what was necessary to the "preservation and prosperity of the federal "Union." And again, at page 74, "Conse- "quently whenever the people of any State, "or number of States, discovered the inad- "equacy of the first form of Federal Gov- "ernment to promote or preserve their "independence, happiness, and union, they "only exerted that natural right in rejecting "it, and adopting another, which all had "unanimously assented to, and of which "no force or compact can deprive the peo- "ple of any State, whenever they see the "necessity, and possess the power to do it. "And since the seceding States, by estab- "lishing a new Constitution and form of "Federal Government among themselves, "without the consent of the rest, have "shown that they consider the right to do "so whenever the occasion may, in their "opinion, require it, as unquestionable; "we may infer that that right has not been "diminished by any new compact which they "may have since entered into, since none "could be more solemn or explicit than the "first, or more binding upon the contracting "parties. Their obligation, therefore, to "preserve the present Constitution, is not "greater than their former obligations were, "to adhere to the articles of the confedera- "tion; each State possessing the same "right of withdrawing itself from the con- "federacy without the consent of the rest, "as any number of them do or ever did, "possess."

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"To deny this, would be to deny to "sovereign independent States, the power "which, as colonies, and dependant terri- "tories, they have mutually agreed they "had a right to exercise, and did actually "exercise, when they shook off the Govern- "ment of England, first, and adopted the "present Constitution of the United States, "in the second instance."

Another instance to the same effect, is to be found in the History of Massachusetts. On the 1st of August, 1812, Governor Strong of Massachusetts, addressed a letter to the three Judges of Massachusetts, in which, amongst other things, he propounded to the Judges this question: "Whether it was for the President of the United States, or for the States themselves, respectively, to deter- mine the constitutional exigency upon which the militia of the States were liable to be ordered out into the service of the Federal Government."

The reply of the Judges was, "that that right was vested solely in the commanders- in-chief of the militia of the several States." This question, it is true, was never formally adjudicated by the Judges, but this was their answer to the question; and it was as much as to say, (so far as the Governor, and the Judges at least could say so) that if the President enforced, or attempted to enforce this right, that was claimed for him, the State of Massachusetts would resist it; and she did resist it, for, in point of fact, she never furnished her quota, or even a soli- tary militiaman, I believe, under the requi- sition which was made upon her by the Pre- sident. What was this but secession, or revolution, or practical nullification, if you choose, and in the most ultra shape? See Supplement to 8th Mass. Reports, page 546. Doubtless your Honors have not forgotten how persistently the conscription and im- pressment scheme of Mr. Monroe, for rais- ing an army in 1815, was resisted and op- posed by five of the States; how it first led to a legislative protest and resolutions on the part of Connecticut, strongly tinctured with secession and nullification; and how it after- wards led to that celebrated conclave called the Hartford Convention, which met on the 15th day of December, 1815, and whose members, I apprehend, were nothing more or less than a set of nullifiers or secession- ists, under the cloak of federalism. See Dwight's History of Connecticut, pages 435, 436, and 437. And when New Hampshire stood out, and continued to stand out, for nearly two years, against the adoption of the Constitution, no attempt was made to force her in by the rest of the States which had adopted it. It might well be said, in fact, that the whole history of this country, *ab urbe condita*, from first to last, is but a practical exhibition of secession, nullifica- tion, or revolution, at some time, and in some shape or other; that it is, at least, the assertion of a principle, of which the present revolution is but the exercise. In his "Brief Enquiry into the nature and charac- ter of the Federal Government," page 124, the learned author (Judge Upshur,) says, "The principle that ours is a consolidated "government of all the people of the United "States, and not a confederation of Sovereign "States, must necessarily render it little less "than omnipotent;" and again, at page 125, "Let it be supposed that a certain number "of States, containing a majority of the "people of all the States, should find it to "their interest to pass laws oppressive to "the minority, and violating their rights "as secured by the Constitution. What re- "dress is there upon the principles of our "author? Is it to be found in the Federal "tribunals? They are themselves a part of "the oppressing government, and are, there- "fore, not impartial judges of the powers of "government. Is it to be found in the virtue "and intelligence of the people? This is the "author's great reliance. He acknowledges "that the system, as he understands it, is "liable to great abuses; but he supposes "that the virtue and intelligence of the "people will, under all circumstances, prove "a sufficient corrective. Of what people? "Of that very majority who have committed

"the injustice complained of, and who, ac-
"cording to the author's theory, are the
"sole judges whether they have power to
"do it or not, and whether it be injustice or
"not. Under such a system as this, it is a
"cruel mockery to talk of the rights of the
"minority. If they possess rights, they
"have no means of vindicating them. The
"majority alone possess the government;
"they alone measure its powers, and wield
"them, without control or responsibility.
"This is despotism of the worst sort, in
"a system like ours. More tolerable, by
"far, is the despotism of one man, than
"that of a party ruling without control,
"consulting its own interests, and justify-
"ing its excesses under the name of repub-
"lican liberty. Free government, so far as
"its protective power is concerned, is made
"for minorities alone."

The opinions of Mr. Calhoun, and of that peculiar school of politicians, of which he may be said to have been the founder, are too well known to require any comment.

Judge GRIER. Mr. Calhoun denied the right of secession as absolutely as any man in the North.

Mr. HARRISON. But he contended as strongly as any man in the South for the doctrine of nullification. Mr. Calhoun, I presume, just at this time, would not be very high authority in Pennsylvania: but, I suppose, I may refer, without offence, to his Honor, Judge Sharswood's letter to Mr. E. Spencer Miller, of the 4th of October last, in which he speaks of this very doctrine of secession as an open question, and as a question which he himself had so regarded and so treated in his lectures for the last ten years. This opinion, I apprehend, is entitled to some weight, not only as emanating from an able judge and eminent jurist, but from one who, but a few days ago, was the judicial nominee and almost unanimous electee of every party in the city of Philadelphia. And what would you think, if I told you, that the President of the United States was himself an avowed secessionist or revolutionist. In his speech in the House of Representatives, delivered January 12th, 1848, Mr. Lincoln, then an honorable member from Illinois, used this language:

"Any people any where, being inclined, and having the power, have the right to rise up and shake off the existing government, and form a new one that suits them better. This is a most valuable, a most sacred right —a right which we hope, and believe, is to liberate the world.

"Nor is this right, confined to cases in which the whole people of an existing government may choose to exercise it. Any portion of such people that *can, may* revolutionize, and make their *own* of so much of the territory as they inhabit. It is a quality of revolutions not to go by *old* lines, or *old* laws; but to break up both, and make new ones." (Appendix, Congressional Globe, 1st Session 30th Congress, page 94.)

I will now tell your Honors why it is that I refer to these authorities. I do not cite them for the purpose either of advocating secession, or of endeavoring to make a secessionist of any of the jury, and, least of all, of attempting to secessionize either of your Honors; but I do cite them for the purpose of showing that good men, and able men, and patriotic men, that the ablest and most respectable authorities, both North and South, have differed very widely on this subject; that whilst some, (and especially of late) are ready to denounce secession as treason, and secessionists as traitors, yet others, and Mr. Rawle amongst the number, have not hesitated to defend secession, not only as a legal right, but as a necessary consequence or corrollary from the Constitution itself, as one of those reserved rights, (as they are called,) which, not being expressly delegated by the Constitution to the Federal Government, nor expressly prohibited by that Constitution to the people, are therefore considered, as being reserved by the Constitution to the people themselves. No one ever doubted either the patriotism or ability of Mr. Rawle; and the time has been, perhaps, when I might have ventured to say the same thing of Mr. Tucker. Thirty years ago, when Mr. Webster and Mr. Hayne discussed secession, on the floor of the Senate, they did it openly—they did it fairly—they did it calmly and dispassionately—they did it like statesmen, and like gentlemen—they discussed it as a pr position, which was positively affirmed upon the one hand, and as positively denied upon the other; and I must say, as I always sa d, and as I have always thought, that Mr. Webster, in my opinion, got by far the best of that argument; but still it never occurred to Mr. Webster, or any one else, to charge Mr. Hayne with treason, or to cause him to be prosecuted as a traitor, simply for entertaining or avowing secession sentiments. And how far it is treason even now, for a single State, or for a number of States in the Union, either to think secession, or to speak secession, or even to act secession, may it please your honors, still remains to be decided. Martially speaking, and as a mere military safe-guard or precaution, persons have been arrested and imprisoned, it is true, since this war commenced, upon the bare supposition of being secessionists; but what I say, and what I submit to your honors is, that, civilly and legally speaking, this question is without a precedent in the history of this country. It is *res intacta* altogether. It has yet to pass into the judgment either of the Supreme Court of the United States, or any of its branches; and the learned Judges of this Court, who are called upon to-day for the first time to decide this question, will no doubt do so, not only with a full sense of all

the legal responsibility which rests upon them, but with a due regard to all the circumstances under which it is presented. They may tell you, perhaps, that this is a question about which men have honestly and innocently differed before, and about which they may honestly and innocently differ again. They will be reluctant, I am sure to tell you, that this man ought to be punished either as traitor or as pirate, simply for entertaining or acting upon a view of the Constitution, which has the sanction of such a man, and such a statesman as Mr. William Rawle. If secession, according to Mr. Rawle, is constitutional, much more is revolution, according to Mr. Webster, constitutional; or rather, much more is revolution independent of the Constitution, and in defiance of it, because it is a higher right; because it is the inherent, and unalienable, and indefeasible right of every people, every where, and under every possible or conceivable form of government upon earth. And all of this, it seems to me—all this difference of opinion, and this discrepancy of authority, which I have shown you, bears materially upon the point at issue; for it bears upon the mind—the purpose—the *quo animo*—the supposed intent of the prisoner in doing the act with which he is charged, and the intent is every thing. It is the intention and the act combined which constitute the offence, if there be any. If the prisoner supposed, as Mr. Rawle did, that secession was constitutional, or if he believed, as Mr. Webster did, that revolution was constitutional, (and why not suppose that he believed so?) then in neither case, I apprehend, ought he to be convicted and punished as a traitor, for having thus seceded or revolutionized, or for aiding in secession or revolution; nor in either case, I imagine, can he be convicted and punished as a pirate, for having accepted and acted under, a commission from a government, which is founded upon such secession or revolution. The point I make is, that he who perpetrates an act, which is notoriously and admittedly wrong, commits a much greater offence than he who perpetrates the same act, where it is of doubtful or even questionable criminality. It has always been regarded as an instance of extreme cruelty in Caligula, that he hung up his laws so high, and that he wrote them in characters so small, that it was impossible for his subjects to decipher them. Here there was no law at all to be deciphered, in characters either large or small—not one statutory enactment—not one syllable in the Constitution—not one solitary decision of the Supreme Court of the United States, any where or by any one, declaring secession to be unconstitutional or illegal.

I make this further point before your honors, that where a government *de facto*, such as this is, (however wrongful,) acquires a mastery or ascendency over the regular government, not only by actual occupation, but by governmental organization and the exercise of governmental functions, that there a resident of such government *de facto*, owes allegiance to the government under which he lives, or, at least, that by rendering allegiance to such government, he does not thereby become a traitor to, and ought not, therefore, to be treated as a traitor by the established government. And why? He may be compelled in self-defence to do so, and then, of course, he is not a traitor. Or he may do so of his own accord, and still he is not a traitor, for he owes at least a temporary, an involuntary, if not a voluntary allegiance, to the acting government. He may be taken and dealt with as a public enemy, or as a prisoner of war, or compelled to resume his allegiance to the government, but he cannot be treated as a traitor; any more than a colonial enemy of Great Britain, during the war of the Revolution, could have been treated as a traitor by that government; nor was he so treated by that government. If this man is a pirate, simply for siding with, or for taking up arms for, or for accepting a commission from the government under which he lived, then I submit to your honors that every colonist, in 1776, who took sides with General Washington, against the government of Great Britain, ought to have been hung up as a traitor by that government. There, as well as here, it was a contest between rebellion and authority; between loyalty and disloyalty; between the new government and the old one. And the British government, according to the theory of its Constitution, had as much right to expect allegiance, and to exact allegiance from the colonies, as the government of the United States has to expect, or to exact it from the States. This, it seems to me, is the present *status in quo* of the Southern Confederacy. It is no longer an insurrection. It has passed the point of mere rebellion. It is impossible to assimilate it to an insurrection, which has all the objection of a rebellion, without possessing any of the prestige or advantage of a regular government. So far as its residents are concerned, and in respect of their obligation to submit to it, and, above all, in respect of their exemption from a charge of treason, for such submission—*quoad* all this, I say, it is not only a government *de facto*, but it has assumed all the semblance, and proportions, and potentiality, and protection, of a regular government. It can no more be now assimilated to an insurrection or rebellion, than it could be assimilated to a mob or to a common riot. Even the newspapers of your city no longer speak of it as a rebellion, but as a "great rebellion,"—As a great rebellion I suppose, in contr distinction to the little whiskey rebellion, which occurred in 1793. Besides, how would my learned friend, Mr. Coffey, set about indicting a community of seven millions of human beings upon a charge

of treason? Or how long would it take him, even with his learned colleagues to assist him, to prepare all the indictments in such a case? Or how could he bring any of the ordinary rules or principles of criminal jurisprudence to bear upon a contest of this description? I put these questions, may it please your honors, almost in the identical language of Mr. Burke, in his great speech upon the subject of "American Conciliation," in which he says:

"At this proposition, I must pause a moment. The thing seems a great deal too big for my ideas of jurisprudence. It should seem, to my way of conceiving such matters, that there is a wide difference in reason and policy, between the mode of proceeding on the irregular conduct of scattered individuals, or even of bands of men who disturb order within the State, and the civil dissensions which may, from time to time, on great questions, agitate the several communities which compose a great empire. It looks to me to be narrow and pedantic, to apply the ordinary ideas of criminal justice to this great public contest. I do not know the method of drawing up an indictment against an whole people. I cannot insult and ridicule the feelings of millions of my fellow creatures as Sir Edward Coke insulted an excellent individual (Sir Walter Raleigh) at the bar. I am not ripe to pass sentence on the gravest public bodies entrusted with magistracies of great authority and dignity, and charged with the safety of their fellow citizens, upon the very same title that I am. I really think that for wise men this is not judicious, for sober men not decent, for minds tinctured with humanity, not mild and merciful."

Your Honors will bear in mind, that this speech was delivered by Mr. Burke, on the 22nd of March, 1775, more than twelve months before the Declaration of Independence, and, at a time, when the American Colonies, all told, both black and white, did not number a population of more than two millions. And what is the inference from all this? Why, if America was not then indictable, at the suit of England, upon a charge of treason, how can the Southern Confederacy be now indictable, at the suit of America, upon a similar charge? But, to come nearer home, in the late case of the United States *vs.* The General Parkhill, page 3, his Honor Judge Cadwalader, said, "Incidental hostilities against the United "States, including the capture of some of "their forts, have been followed by organ-"ized opposing hostilities, and counter hos-"tilities, on so large a scale, that the "present proportions of the contest resemble "those of a general war." And again, at page 8, "If the authority of an established "government has been suspended in a part "of its territory by insurgents, who have "temporarily substituted a revolutionary "government in it, other governments "which are not parties to the contest can-"not, without a breach of international "decorum, declare precipitately that the "case is that of civil war, as distinguished "from rebellion or organized war. But if "civil war, in truth, is its legal character, "such other governments may lawfully "treat the revolted insurgents, not as mere "pirates, or outlaws, but as entitled, in the "war to the same immunities as ordinary "belligerents in a foreign war." And again on page 11, "The foregoing remarks do "not suffice to define the legal character of "the contest in question. It is a civil war "as distinguished from such unorganized "intestine war as occurs in the case of a "mere insurrectionary rebellion." Here the distinction between insurrection and revolution; between organized and unorganized civil war; between mere rebellion and a government, which is the result of that rebellion, was well and forcibly taken by your Honor, and it seems to me, to be but a recognition by your Honor, in a different shape, of the position taken by Mr. Burke upon the same subject in 1775.

Doubtless your Honors well remember the spirited contest in 1775, between the little American privateer the Randolph, and the British man-of-war the Yarmouth, in which a gallant son of one of the most prominent families of Pennsylvania, lost his life. Now, even if the American colonies had failed to establish their independence, it would probably not have occurred to the descendants of Captain Biddle, of Philadelphia, that there was a piratical bar-sinister in the escutcheon of the Biddle family; any more than it would have occurred to your Honors, whose ancestors I believe, as well as mine did some service in the cause of the Revolution, that we were descended from a line of traitors. Or, can it be, gentlemen, that the only difference between the rebel and the patriot, between a privateer and a corsair, is the difference between successful and unsuccessful revolution? I apprehend not. I suppose, may it please your Honors, that a much sounder and a far more intelligible criterion, is to be found in the distinction which was taken by one of your Honors in the case of the General Parkhill; is to be found in the distinction between insurrection and revolution, between organized and unorganized civil war, between mere rebellion itself, and a government which is the result of that rebellion — a government, which, however wrongful, or evanescent, so long as it is capable of exercising authority over, and demanding and exacting allegiance from its subjects, is capable of affording to those subjects, at least an exemption from a charge of treason for such allegiance.

I trust your Honors will see what I am aiming at. I am not arguing before your Honors, that there was any necessity or ground for this rebellion; for it might be

safely conceded, that there was none: but, I am arguing, before your Honors, that rebellion has taken place—that revolution has been the result of that rebellion—that government has been the result of that revolution, and that that government, whether right or wrong, is so far a government *de facto* if not *de jure*, as to authorize, or, at least, to excuse privateering. This is what I contend for, and what I mean to contend for before your Honors; and what your Honors and this jury, I conceive, would be perfectly well warranted in sustaining me in. I do not ask you either to recognize the Southern Confederacy, or to spare its subjects. No, capture them; imprison them; subjugate them if you can; exterminate them if you choose; but until you do so, and so long as this war shall last (whether it be long or short) in God's name, treat them as they are treating you—treat them as you would expect to be treated by them—treat them as the law of nations and the dictates of humanity require, that they should be treated—treat them as captives, not as criminals—treat them as prisoners of war, not as traitors or as pirates. This is wisdom, policy, justice, law, humanity, mercy, christianity. Take my word for it, this will go far to prevent retaliation, and to save the effusion of blood upon both sides, which is always, according to Vattel, to be mainly looked to in a time of war. Whether it is a civil war, or a foreign war, or a simple insurrection or rebellion, there is no difference in the humanity which ought to be shown to prisioners. As a civil war between two parties of the same nation, it stands upon the same ground, in every respect, as a public war between two different nations. "Custom" (says Vattel, b. 3, ch. 18, s. 292,) "appropriates the term of *civil war* "to every war between the members of one "and the same political society. If it be "between part of the citizens on the one "side, and the sovereign with those who "continue in obedience to him on the other, "provided the malcontents have any reason "for taking up arms, nothing further is "required to entitle such disturbance to the "name of *civil war*, and not that of *rebellion*. "This latter term is applied only to such "an insurrection against lawful authority as "is void of all appearance of justice. The "sovereign indeed, never fails to bestow "the appellation of rebels on all such of his "subjects as openly resist him; but when "the latter have acquired sufficient strength "to give him effectual opposition, and to "oblige him to carry on the war against "them according to the established rules, "he must necessarily submit to the use of "the term 'civil war.'" And again (section 293,) "a civil war breaks the bands of "society and government, or at least sus-"pends their force and effect: it produces "in the nation two independent parties, "who consider each other as enemies and "acknowledge no common judge. Those "two parties, therefore, must necessarily "be considered as thenceforward consti-"tuting, at least for a time, two separate "bodies, two distinct societies. Though "one of the parties may have been to blame "in breaking the unity of the State and "resisting the lawful authority, they are "not the less divided in fact. Besides, "who shall judge them? who shall pro-"nounce on which side the right or the "wrong lies? On earth they have no com-"mon superior. They stand therefore in "precisely the same predicament as two "nations, who engage in a contest, and "being unable to come to an agreement, "have recourse to arms.

"This being the case, it is very evident "that the common laws of war—those "maxims of humanity, moderation and "honor, which we have already detailed in "the course of this work—ought to be ob-"servedby both parties in every civil war"

And what has the government done heretofore with its prisoners? What did it do with them at Fort Hatteras? If prisoners of war at Fort Hatteras, why not prisoners of war on board the Petrel, or the Enchantress, or any where else? Or, if prisoners upon land, why not at sea? Who ever heard of such a distinction as is now attempted to be maintained by the government of the United States? Or why is it, up to this time, that the first Southern prisoner, whether privateer or otherwise, has yet to be punished as a traitor by the government? It is because the government of the United States, however it may deprecate the existence of this revolutionary movement, or however determined or able it may be to crush it out, is yet unwilling—whether from motives of humanity, or from motives of policy, is not material—to regard this war as anything more than an unauthorized, but organized civil war, or to consider the captured subjects of the Southern Confederacy, whether privateers or soldiers, as anything more than prisoners of war.

When Fort Hatteras was surrendered the other day, was it not one of the terms of that surrender, that its prisoners should be treated as prisoners of war? I appeal to the learned counsel (Judge Kelley) who concludes this prosecution for the government, to say, if it is not so. Beyond the newspaper statements to that effect, I have no evidence, I confess to show the fact, but it is not my fault. I have written to Washington, I even telegraphed to Washington to obtain it, but I could not do so I appeal, therefore, to the learned counsel himself, to say, (if, forsooth, he is in the secrets of the government,) whether the articles of capitulation at Fort Hatteras, which were accepted and signed by General Butler, on behalf of the Government of the United States, were

not also accepted and signed by Commodore Barron, as Flag officer inthe service of the Confederate Navy ?

Mr. KELLEY. Do you appeal for a present answer ?

Mr. HARRISON. No, sir, it will do when the gentleman sums up.

Here then, may it please your Honors, and in the most solemn form imaginable, the Government of the United States not only recognized the Southern Confederacy as a belligerent, but as a government ; as a government *de facto* if not *de jure ;* as a government having competent authority, through its proper officer, not only to dictate but to consummate the terms upon which a beleagured fortress was surrendered. And has not the Government of the United States recently made an exchange of prisoners with the Southern Confederacy ? Again call for light upon the subject. What was I this, but another and a still more formal recognition of the Southern Confederacy as a government ? And after all this, may it please your honors ; and after much more of the same description, which I have not the time at present to recur to, would it not be the most astonishing thing in the world, if persons, thus treated by the government, as prisoners of war in one place, were to be hung up as pirates in another? Verily it would sound well in the after history of the United States, that the sword of criminal justice, which had overlooked so shining a mark as the Honorable Charles James Faulkner, of Virginia, had been plunged at last, and for the first time, into the bosom of a poor seaman like William Smith ; and that the learned legal triumvirate who represent the government on this occasion, had been instrumental in effecting so distinguished a public execution. If they should fail, however, in that attempt (as I hope they will) they will at least have the consolation of exclaiming,

"Nec tam turpe fuit vinci,
Quam contendisse decorum est."

So much for the first point, in the case, which is, that the Southern Confederacy is a government *de facto* if not *de jure*, at least so far as to authorize privateering—or at least so far as to exempt its privateers from all the penalties of the crime of piracy.

The next point is, that, whether the commission was valid or invalid, the prisoner at least believed, and had reason to believe, that it was valid, and that he is protected in law, by that belief. Whether he looked to the government itself, or to the power of that government, or to the conformation of that government, or to the operations and success of that government, or to the mode by which that government was established, whether founded in revolution or secession, or to the difference of opinion, as well as conflict of authority in regard to it—all, I say, was well calculated to produce the belief upon his mind, (and it no doubt did), that he was acting under a commission, which, whether valid or invalid, was at least sufficient to protect him against a charge of piracy. When, on the morning of the 12th of June, 1861, he first saw and heard the letters of marque and reprisal publicly read by Captain Coxsetter, from the quarter deck of the *Jeff. Davis*, did he not believe, and did he not have reason to believe, and would not the jury, themselves, under similar circumstances, have believed, that Captain Coxsetter was a privateer and not a pirate ; and that the commission and flag under which they sailed, were at least potential enough to shield them from a felon's grave ? This brings him within the principle which I have spoken of, that a well founded ignorance of the law, and a difference of opinion, and a discrepancy of authority as to what the law is, and especially in the absence of any positive law or express decision upon the subject, may well exempt, at least from criminal, if not from civil responsibility. The maxim, that every man is presumed at his peril to know the law, applies only to the law, either as it is actually written, or as it is actually expounded by the judges; either to the *lex scripta* or to the *lex judicata* of the country. Here there was neither. Where is the law, or where is the constitution, or where is the judicial exposition, either of law or constitution, declaring secession to be unconstitutional or illegal? No where—no where. I undertake to assert, that it is no where. The courts have said, and very properly, that it is not competent to any State in the Union, and under the Union, and under the Constitution of that Union, to refuse obedience to its laws, and still remain in it ; but if ever the question which I am now considering ; if ever the question, as to how far it is treason for any State, or for any number of States in the Union, not only to revolutionize, but to secede—if ever this question, I say, has been judicially acted upon or decided, I have yet to be apprised of it ; and I challenge the production by the government of a solitary decision to that effect.

So much for the second ground of the defence ; and this is a ground, gentlemen, upon which you may readily acquit the prisoner, without recognizing the right of the Southern Confederacy as a government, to authorize privateering. In the case of the United States *vs.* Hanway, (2 Wallace, Jr., p. 206) ignorance of the acts of Congress which he was charged with violating, was one of the very grounds assigned by your Honor, Judge Grier, for the acquittal of the prisoner.

The third point I shall make is, that, whether the commission was valid or invalid, and whether the prisoner believed or did not believe that it was valid, he is still protected ; and this concedes every thing to the government, save the guilt of the accused. What I say now is, that he had no

discretion or volition in the premises; that in legal contemplation, it cannot be said that he ever consented to become a privateer. "Consent," (says Mr. Story,) "is an act of reason, accompanied with deliberation; the mind weighing as in a balance the good and the evil upon both sides." Can it be said that he ever gave such a consent in this case? Look to the sequestration and confiscation laws of the Southern Confederacy. Was there no compulsion in that? Or look to the militia sy tem of that Confederacy, which requires every able bodied man, over the age of sixteen, and under the age of sixty, to render military or naval duty or to quit the country. Was there no compulsion in that either? How far he may have voluntarily submitted to the *vis major*, or to the over ruling necessity which surrounded him, it is impossible for us to tell, nor is it necessary, in truth, that we should tell. It is enough for you to know, that he was surrounded, in fact, by such neces ity; that he was acting under a physical, or at least under a moral or legal duress, which there was no resisting; and that he had no alternative under the circumstances, but submission or flight; and flight, it may be, was impossible. If his property and his home were in the South, he may not have been able to afford to leave them. It may have been utter, absolute, startling, staring ruin for him to think of leaving them; or, if his family and his friends lived South, he may have been anxious, if possible, to get them away from there, but had not the means of doing so. What then? Would you hang a man as a traitor, simply for sticking to a country where rebellion is, when it was not in his power to get away from it, and when he was compelled to submit to it if he staid. Was not this the condition of this prisoner? He owed, at least, a temporary, an involuntary, if not a voluntary allegiance to the government under which he lived. That government was strong enough to enforce its laws. Right or wrong, it was not only strong enough to enforce its laws, but it did enforce them. It exacted his allegiance, and it demanded his support—and he was bound to pay it—and if he was bound to pay it in one shape, he had a right to pay it in another. If he was bound to enlist as a volunteer, or as a soldier in the Confederate army, he had a right to become a privateer; because privateering, as I understand it, is but another form of fealty; but another mode of manifesting his allegiance to the reigning government. And just precisely such consideration as would have been shown to him as a captured volunteer or soldier in the Confederate service, ought to be shown to him as a captured privateer. Nothing more, nothing less. If, according to the ruling in the case of the Parkhill, a mere residence South, without more, is sufficient to denationalize such resident as an American citizen, then I put it to you, gentlemen of the jury, and I put it to their Honors upon the bench, what was it possible for this prisoner to have done, but to go over, heart and hand, body and soul, willingly or unwillingly, to the Southern Confederacy, if it was not in his power to get away from it. I have a right to presume in this case, from the humble circumstances and condition of the prisoner, that it was not in his power to get away from it. On the question of duress, I refer your Honors to 1 Story, Eq. s. 222, Puffendorf (Barbeyrack's note) 16. ch. 6, s. 3; Grotius lib. 2, ch. 11, s. 4 and 5, and to his Honor, Judge Cadwalader's opinion, and the authorities cited by him in the late case of Charles A. Greiner; see Leg. Int. 10th of May, 1861, p. 150.

"All consent," (says Grotius,) "supposes three things. 1st. A physical power. 2nd. A moral power, and 3rd. A serious and free use of them." Now I apprehend, may it please Honors, that a Unionist South, just at this time, would stand about as poor a chance of speaking and acting what he thought, as a Secessionist would here in Philadelphia. In either case, he would have to lie low and keep dark; to study the philosophy of reticence; and to have a thorough knowledge and comprehension of that little cabalistical word called "*mum*." If he did not, he might possibly find, in his case, that the transition from Philadelphia to Fort Lafayette, was quite as sudden and unexpected as that of a certain Christopher Sly, who fell asleep upon the hard pavement, and woke up in the bed chamber of a nobleman. Or possibly, the obligation to submit in this case, might be well referred to that *lex necessitatis* which is spoken of by Vattel, and which was held to have justified the rape of the Sabine women. Certainly, the instinct of self-preservation, is quite as strong as that of the propagation of the species.

I rely upon your Honors' decision in the case of Greiner, for two purposes, 1st. to show that actual force, or its equivalent, is a good legal defence here for the accused; and then, I contend, in this connection, that the sequestration, confiscation, and militia laws, and army bill, and the various proclamations, and other proceedings of the Southern Confederacy, were tantamount in law to such a force; and 2nd, to show that the obligation to submit to any government, and the right to receive protection from that government, are convertible and correllative terms. It is of the essence of every government; it enters necessarily and inevitably into every man's conception of any government, that whilst it receives support upon the one hand, it is bound to afford protection upon the other; and the moment you destroy or suspend the one, you annihilate or suspend the other; so, that, when the courts of the United States became completely suspended or closed in the Southern

Confederacy (as it is a matter of notoriety as well as proof, that they have been for months, and that they still are,) so as to be no longer able to administer justice, and to enforce the law in that Confederacy, that then a resident of such Confederacy, became absolved, at least so far absolved from all allegiance to the government of the United States, so as to place him upon the footing of a public enemy, and not of a traitor, to that government, because he rendered that allegiance, which he was bound to render to the government under which he lived. This, it seems to me, is the plain English and purport of you Honors' decision in the Greiner case; and Vattel's Law of Nations, b. 3, ch. 18, s. 200, is to the same effect. It is said in Martin *vs.* Hunter's Lessee, (1 Wheaton, 363,) that when judicial process is obstructed by any opposition, which it cannot overcome, that government is no more. I know your Honor, Judge Cadwalader, said, in the case of the Parkhill, that the right to revolutionize could not be considered here, until the power to revolutionize had been established. Very well. But my answer to that is, first, that I am not considering the right to revolutionize but the effect of revolution; and second, even if it were necessary to consider the right to revolutionize, and if that right were only considerable after the power to revolutionize has been established, still, I say, that that power has in fact been established, or at least so far established by the Southern Confederacy, as to bring it fully and fairly within the qualification or restriction which was laid down by your Honor in the Parkhill case.

So much for the third point of the defence; and this is another ground upon which the jury may acquit the prisoner, without conceding the right of the Southern Confederacy to establish privateering.

Fourth and lastly:—This court, I contend, has no jurisdiction of this case. The Statute says, that the prisoner must be tried "before the Circuit Court of the United States, for the District into which he shall be brought, or in which he shall be found." This means, into which he shall *first* be brought, or where he shall *first* be found, and this was neither. He was neither found in Philadelphia, nor was he brought to Philadelphia in the sense of the Statute. On the contrary, before coming here at all, he was twice brought into Hampton Roads, within four or five hundred yards of the Virginia coast, and there he was detained as a prisoner on board the *Albatross*, for several days. This gave jurisdiction to the Circuit Court of the United States, for the Eastern District of Virginia; and, although that court is now practically suspended, and there is no longer any Judge thereof in Virginia, still, according to your Honors' decision in the case of Greiner, its jurisdiction, at least, is unimpaired. The Statute could not have intended to use the word 'found' as synonymous with 'apprehended.' If it did, still the prisoner, I say, was not apprehended in Philadelphia, but on the high seas, and as he could not have been tried where he was first arrested, he ought to have been tried in the District into which he was first brought, which was the Eastern District of Virginia. This is all I have to say upon the question of jurisdiction.

And now, may it please your Honors, I have a word or two to say to the learned counsel, Mr. Earle, who opened the argument for the prosecution. I have not suffered myself to be drawn into a discussion of the origin of this unfortunate war. Whether the blame is on the North, or on the South, or a little on both—whether it is the natural and necessary offspring either of slavery, or of anti-slavery propagandism—whether it originated in Southern ultraism, or in Northern abolition—whether it originated with the party to which the learned counsel himself belongs, or some where else—these are questions, I say, which I will not permit myself to be dragged into for a moment, not, even, if such an example had been set me by the learned counsel. If I did, however, I might probably hold the learned counsel himself to his full share of responsibility in the matter. I might possibly venture to suggest to him, that it is he himself—that it is such ultraists and extremists as he is, both North and South, and in the pulpit as well as out of it—that it is such virulence of language, and such intolerance of opinion, as we have heard to day, (and this is not the first time, and in this very Court House, that I have heard such language from that counsel), which has done more to sever the cords of brotherly love, and to shake the foundations of this government, than any thing else. But, be this as it may, I assure the learned counsel of one thing, that no one regrets this unfortunate condition of the country more than I do, or would rejoice to see it remedied, more than I would. It is the last picture upon earth which I ever expected, or desired, or designed to contemplate. And if ever the learned counsel thinks proper to erect an altar to the manes of a broken Union, (if broken indeed it be), I promise to be as honest and as earnest a worshipper at that altar, and to shed as few crocodile tears over its precious relics, as the learned counsel for the government or any one else.

Two years ago, when I removed from Virginia to Philadelphia, all (at least comparatively speaking) was peace, tranquillity, happiness, power, Union—a Union not in name only, but in fact—a Union, it is true, to some extent, discordant and belligerent, but still a Union. But now what is it? In the last few months, the pistol has taken the place of the ploughshare—peace has been exchanged for war—and the sword, as

it leaps to-day from its scabbard, hardly knows, whether it is to be plunged into the bosom of an enemy, or a stranger, or into that of a father, or a brother, or even of a beloved child. But I will not pursue this picture any farther. It is sickening, saddening, heart-rending, woful, wretched in the extreme. It is a spectacle, over which angels well might weep, and devils laugh. But the learned counsel (Mr. Earle) made a singular argument before the jury. I would not do him any injustice. I would not detract from the force of his argument, if I could. If it was not so able an argument as I have sometimes heard from him; it was at least well calculated to produce all the lodgment and effect, which it was designed to have. It was an argument, too, to which I listened, I confess, both with pain and pleasure; with pleasure, because I trust I can appreciate the well rounded periods, and the flowing diction of that counsel, however we may differ, as to the purpose or the principles, to which he is endeavoring to apply them; with pain, because it is a matter of no little regret to me, I confess, that one so gifted as the learned counsel, should have made this the occasion of such a display, as we have heard to-day; that he should have lost sight of the fact entirely (as he seems to have done) that this is not a hustings, or an arena, but a Court of Justice; and that this man, that this unfortunate individual now before you, whether he be privateer or pirate, rebel or patriot, guilty or innocent, is nevertheless entitled to a fair and impartial, and dignified, and decorous trial, at the hands of this jury. How far it may comport with such a trial, or with the dignity or magnanimity of the prosecution, not only to condemn but to revile; not only to prosecute with severity, but to pursue with venom; and even to appeal to prejudice as well as reason to secure a verdict,—I leave it to the learned counsel for the Government, when professional rivalry has subsided, and when the passions of this day have passed away, to determine for himself. My learned friend, Mr. Coffey—I know him too well to think the contrary—would not have imitated the example which has been set him by his learned colleague. He would have done his duty, I am sure, but nothing more; and whilst he discharged that duty skillfully and faithfully, as he ought to have done (and as I think he would) he would not have encroached one hair's breadth, wantonly and unnecessarily, upon the feelings or the rights of those, whom accident, or misfortune, or even crime, may have thrown across his path. If he felt any indignation, or manifested any indignation, upon the occasion, it would rather have been against the heads and front of the offence, (who are not before you) and not against this humble individual, who, whether he be guilty, or whether he be innocent of the offence, is but an instrument in the hands of others. This is the part of manhood, and of noble nature everywhere; and my learned friend Mr. Coffey (I would he were here to hear me say so) is every inch a man. He would have recollected too, I am sure that there are others, besides the prisoner, who are interested in the verdict you may render. Would to God that it were otherwise! Would to God, gentlemen, that whenever it becomes necessary to enforce the severity of the law, the blow could fall only upon the guilty, or upon those at least who are supposed to be. But this we know to be impossible. Constituted and circumstanced as we are, it is impossible. The meanest wretch that crawls upon the face of the earth has still a claim upon the sympathy of some one. You cannot separate him; you cannot alienate him; you cannot tear him from that sympathy. You cannot touch a chord in his bosom which does not vibrate, by a thousand feelings, and with a thousand sympathies and emotions, through the hearts of others. Place him where you may, dishonor and degrade him, as you choose; in all time of his tribulation; in all time of his distress; in prosperity and in adversity; in guilt, or in innocence; in honor and dishonor; in weal or in woe, he is still the centre of a circle, which he calls his own, and to which kindred, and home, and friends, and family, and a thousand interesting and endearing associations and relations, have indissolubly and forever bound him. Into this little sanctuary of this humble prisoner, my learned friend (Mr. Coffey) would no more obtrude with ruthless step, than he would tread too hard upon the cradle of an only child, (if he had one,) or upon the grave of a departed mother.

Gentlemen, if you have a doubt as to the guilt of the accused, you ought to acquit him. The law requires no sacrifice; it demands no victim at your hands. It would much rather that ninety-nine guilty persons should escape from punishment, than that one innocent man should be made to suffer. If you have a doubt therefore, you should acquit. Absolute, mathematical, or metaphysical certainty, is not to be expected or required. But still if you have a doubt, upon your minds, a solitary doubt in reason, as to the guilt or innocence of the prisoner, it is your duty to acquit him. The law requires you to give him the benefit of every doubt, whether as to law or as to fact, which the case admits of. And it seems to me, it would be difficult if not impossible for any unprejudiced, or even prejudiced mind to say, that this case, in all its branches, and upon all the points which I have stated, (and which will be no doubt much more fully, and much more forcibly presented by my learned colleague, Mr.

Wharton who concludes the defence of the accused,) is utterly free from all that doubt which entitles him to an acquittal at your hands. I hardly think you will be able to come to this conclusion.

Gentlemen, I have no ground in this case for any personal appeal to you for the prisoner. He has none of those appliances either of wealth or station or connexion, which sometimes lend an interest and importance to a case like this. He stands here alone, and he looks to you alone for all that portion either of justice or of mercy, which is left to him upon earth. So far, however, I do appeal to you, and I have a right to appeal to you in his behalf. To you, at least, it is a matter of little consequence, whether he is an ex-minister of France, or a Senator of the United States, or an humble pilot from Savannah, rocked, almost from his infancy, upon the sea itself. The law knows no one, and ought to know no one, in the administration of criminal justice. It punishes all alike. It looks with an eye single to the crime, without reference to the condition of the criminal. It metes out to every man, and every where, the same measure and degree of human justice; "good measure, pressed down, shaken together, and running over." This is all I ask, or which I have a right to ask for the accused. With these remarks, gentlemen, so far as I am concerned, and with many thanks to you, as well as to their Honors upon the bench, for the patience and kindness with which you have been pleased to listen to me upon this occasion, I submit the case of the prisoner into your hands.

Mr. Wharton. May it please your Honors, Gentlemen of the Jury, after the very full, and, I may say, exhaustive argument of my learned colleague, it would appear almost unnecessary for me to consume more of your time in the defence of this case. This man, however, who sits behind me, and who was a perfect stranger to me until about three days ago, has asked my professional services in his behalf, and in the discharge of my professional duty I have accorded them to him. Feeble although that effort may be, that effort will be now rendered, as briefly as I can make it consistently with my sense of duty.

This case, gentlemen, commends itself to your consideration not only by reason of its gravity, but of its novelty. It is a grave case, because the happiness of a Northern wife, of a little boy at a Northern college, and of an aged ancestor yet living at the South, hang upon your verdict. Besides that, the life of one who has heretofore passed among his fellows as an honest, industrious, and good man, hangs upon it. The novelty of the question, also, commends it to your grave consideration. It is the first time, thank God, in the history of our country, in which such a question has been presented to the determination of a jury. Since the formation of our happy constitution of government, no man has been tried as this man is now tried. I believe it to be the first case in which one has stood before a jury of his countrymen, his life resting upon their verdict, for alleged disobedience to such a law as this which is now on the statute book. We have had heretofore in the history of our country, no organized civil war. We have had cases of partial rebellion; the history of our own Commonwealth, unfortunately, furnishes the two most prominent instances. You have heard of the insurrection in the West, at Pittsburgh, and of the Northampton insurrection; they both occurred within the limits of Pennsylvania. They were the resistance of armed bodies of men (not, however, claiming to themselves the functions of civil government), against the laws of the United States. They were dealt with, and properly dealt with, as traitors, and were convicted as such. But if this is the first instance in the history of the United States of America, in which a man has been placed in a court of justice to answer with the penalty of his life for an offence such as that with which this man is charged, and who has presented to a jury the defence which he does, I trust it may be the last arising out of an organized civil war in the United States of America. There is everything, therefore, gentlemen, in this case, to commend it to your careful and conscientious deliberation; and I am sure that neither you nor either of the learned Judges on the bench will criticise the counsel in the cause for the consumption of time in its discussion, or for the presentation of points which may be—many of them, I hope not all of them—foreign to your prepossessions and your opinions as citizens. I am sensible of the difficulty of arguing such a case as this before a jury of citizens of the United States of America, and before Judges who have been sworn to support the Constitution of the United States, and faithfully to administer her laws. At the same time, I feel entirely confident that if I can satisfy those Judges or yourselves, gentlemen, that the existing laws of the United States do not mean such a case as the present; if, on a fair consideration of the question presented, the result should be reached that this man is not within the spirit of the existing statutes of the United States, whatever your political opinions may be in regard to the course of those persons at the South with whom this man was associated, you

will cheerfully render a verdict of acquittal and leave it to the Congress of the United States to meet the exigency of the case by after-legislation.

I am quite justified, I think, in saying that we are in a state of things and in a condition of the country that was hardly anticipated when our government was formed and our existing laws were enacted. No man doubts that we are in a state of war in the United States of America. Every mail brings us the news of the death of some one who has fallen upon the battle-field, and its mournful tidings come heavily to many a heart in Pennsylvania. No man, I say, can doubt that we are in a state of war; and yet who will assert that that war is within the letter of the Constitution of the United States, which declares that the Congress shall "declare war?" We are governed by statutes which were passed, just as that clause of the Constitution was penned, not with a view at all to such a case as the present, but with a regard to our foreign relations; and so far as the statutes which are supposed to apply to this case are concerned, with a view to offences entirely diderent, as I shall endeavor to show you, from that with which this man is charged. In other words, in construing this statute of the United States, just as in construing the Constitution of the United States, we must take things as we find them; and if we discover that we are in circumstances which are thought to justify the President of the United States and the great officers of the Government in asserting that they are contending for the life of the Union and must shut their eyes to the letter of the Constitution; and when the President, in substance, says, "I take from necessity a course which is not in strict conformity to the written Constitution, but I rely for my approval on the sanction of the representatives of the people, to be afterwards assembled;" and when we find these same great officers of Government maintaining that, in consequence of the imminent peril to which our Government is exposed, we must not regard the provision of the Constitution relative to the great writ of *habeas corpus*, that shield of individual right; and when we thus find the supposed necessities of the case excusing these departures from the spirit of the Constitution, shall we not say, gentlemen, and will you not be glad to say in regard to the poor man now before you, that if the statute under which he is indicted has no reference, and had none in the intention of its makers to such a case as his, in the name of Justice let him go from this Court, to be welcomed by his wife and his child. If there has been no law for the President, in his acts, but that of necessity, do not now reject such a palliation for the conduct of the unfortunate accused.

Now, may it please your Honors, this man stands, as I understand it, indicted under an Act of Congress passed in 1820. That Act is in general words,—it says that any person who shall commit robbery on the high seas shall be punished with death. The indictment is under that particular Act of Congress. It was so opened by my friend, the Assistant District Attorney. His colleague, Mr. Earle, who summed up this case for the Government, threw into the argument another Act of Congress as perhaps applicable to the case. I do not understand that it was distinctly put before the Court and jury, that the indictment was framed under the Act of 1790; but that previous Act of Congress, in view of the probable weakness of the prosecution, it was supposed, might possibly help the case. Under one or the other of these Acts of Congress, this man stands indicted, and upon your decision thereupon depends the question of his life or death. I will, however, take the case as it was opened to you by the District Attorney, and will suppose that he stands in peril of his life by reason of his alleged violation of the Act of Congress of 1820, which, almost in the words I have used, punishes with death robbery by any person on the high seas. How stands the question under that law?

The Act of 1819, passed a year before, as your Honors well know, was temporary in its terms; it expired long ago. It provided that any one who committed piracy "as defined by the law of nations," should suffer death; and the question came up in the case of the United States against Smith, 5 Wheaton, p. 153, in the first place, whether Congress by that Act had fulfilled the constitutional provision which gave it power "to define and punish piracies" by providing that piracy should be, not what was expressly defined by the statute itself, but such a crime as the law of nations defined it to be. The Supreme Court decided that the particular Act was a constitutional exercise by Congress of its power in the premises, and that the definition of piracy by the law of nations was so specific that a man in the Courts of the United States could be indicted, tried, convicted, and hanged for the offence under that Act of Congress. Piracy was an offence so well known to the laws of nations, that Congress could adopt it in those general words, and declare that whatever was piracy by the law of nations, should be piracy under the statutes of the United States. Questions, however, of constitu-

tional power were raised, and, no doubt, in view of that fact, Congress, in the following year, passed the present Act under which William Smith is indicted; which, while it extends the provisions of the Act of 1819 beyond the high seas, into bays and rivers emptying into the ocean, strikes out the general definition of piracy contained in the Act of 1819, and puts into the Act of 1820, in express terms, the definition which was recognized by the law of nations. The point, therefore, that I respectfully make to your Honors, and to the gentlemen of the jury, is, that whatever was piracy under the laws of nations is piracy under the Act of 1820, under which this man stands indicted; and that whatever was not piracy by the law of nations, is not piracy under the Act of 1820. There is no alteration in the two Acts, except that which I have indicated. The Act of 1819 was a temporary Act; it contained certain provisions which were temporary in their character; it had also a provision, in its fifth section, which was more general, which assumed to punish piracy as defined by the law of nations; but as it was a question which was gravely mooted in the country, and which ultimately came before the Supreme Court of the United States for decision, whether the definition of the crime was so precise as to make it just to punish persons under it, Congress, in 1820, re-affirmed the principle of the Act, by substituting the present for the then Act of 1819, and instead of leaving the definition as it had stood in the first Act, in the general phraseology that I have mentioned, adopted into its own terms that phraseology which the law of nations had furnished as the definition of piracy.

If William Smith, then, is not a pirate by the law of nations, he is not a pirate in the sense of this Act of Congress.

Now, gentlemen, let me say one word before I leave this head, on the general subject of piracy. It is a subject that we are compelled to discuss here, not the most agreeable, perhaps, that could be selected, but fortunately we have treatises on the topic, that are in the hands of most general readers, certainly of all lawyers and judges; and there is just as much precision in the description of piracy as of any other crime known to the law. A pirate is a robber of a particular class; he is a robber on the sea, or, by statutes of different countries, on the bays and rivers which empty into the sea. He is a sea rover; the word in its original root signifying roving; and the main difference between a robber on land and one on sea, has respect to the place in which he commits his crime. A pirate has all the bad qualities of an ordinary robber, and he carries these with him on the great pathway of nations. The term becomes known to the law of nations because of the place of the commission of the offence. A robber on land pursues his avocation within the jurisdiction of a particular country. He assaults you on the highways of Pennsylvania, or Virginia, or the roads of New York; he does not extend his operations over the whole earth; he is local in the commission of his crime, and is therefore within the jurisdiction of a municipal tribunal. The robber who goes upon the seas, goes beyond the jurisdiction of any nation; plunders any or all, upon the great highway of nations; and therefore his offence is against all nations; he goes where the citizens of all nations travel, where the Englishman can be caught, where the Frenchman can be surprised, and where the Spaniard can be found, as well as our own countrymen; he goes not into some secret place in the woods of Pennsylvania, and there assaults and robs his victim. Hence, he is an enemy of the human race, and his offence is punished by the laws of all nations; he knows no law himself, and as with Cain, every man's hand is against him, and his hand is against every man. Such is a pirate. Whether the poor man behind me comes under this description, you are to say by your verdict.

It was on this principle, therefore, that the United States of America, claiming to be one of the great family of the civilized nations of the earth, undertook to do what all other nations had done, what the parent country especially had done—punish this great offence against civilization; and hence it was that she passed her acts in regard to piracy; and that in her earliest acts on the subject, she said, we know no other law, than that which our sister governments recognize; we know the law of nations; we profess to follow that law, and to be governed by it, and whatever is a crime against that law, we recognise as a crime against our law and we punish it with death. It being a well settled principle in our government and in the judiciary department of it, that there is no criminal law of the United States that is not to be found in our acts of legislation, (a principle that is at once recognized by the counsel of the government and by the judges on the bench,) Congress provided for the definition and punishment of piracy on the statute book of the country. Now, gentlemen, what the definition of the crime of piracy by the law of nations is, my colleague has elaborately considered. I shall therefore, without troubling you with the reading of specific authorities, merely refer to some as I go along. The law is perfectly well settled, as your Honors know. I have

given the general definition of it, adopted by the Supreme Court of the United States in the several cases in 5th Wheaton, and you will find in the note to one of those cases, a complete syllabus of the law on the subject of piracy, and citations at length from all the writers on the subject. I will give your honors a reference to the learned note in 5th Wheaton.

Judge GRIER. Made by Judge Story himself.

Mr. WHARTON. Yes, sir. On page 161 of 5th Wheaton, at the case of the United States *v.* Smith, your Honors will find a note extending over many pages, which contains all the necessary citations upon the subject of piracy as defined by the law of nations.

The definition extracted from those writers and adopted by the Supreme Court of the United States, is, that piracy is forcible depredation upon the sea, *animo furandi*; and as put in another place, it is depredation on the seas without the authority of a commission, or beyond that authority. It is sometimes difficult, gentlemen, in discussing a case before men who are not lawyers, to impart the same exact idea which is on an advocate's mind when a technical term is employed; but I shall endeavor in a few words to do this, because the judges will say to you in their charge, that, although laymen, it is your duty in a criminal case, or your privilege rather, to pass upon the law as well as the fact; and you cannot find a man guilty, or pronounce him innocent in a prosecution under a law, without understanding what that law is. You cannot conscientiously discharge your duty otherwise. The meaning of the term *animo furandi*, I respectfully submit, was misconceived by the District Attorney, if he intended to give, as I supposed him to do, a definition of those words in his opening address to the jury. Perhaps I do him injustice; if so, I shall very cheerfully correct it in a moment. After using the term, he said, that the words signified the force and violence by which property was taken from another.

Allow me to say that the mere force or violence has nothing to do with the question; such a definition as that would make every belligerent, a pirate or a robber. You march down to the South at the call of your country, and you meet there at the cannon's mouth or at the bayonet's point the belligerents who are opposed to you. They take your property or your life, or you take their's, with force and violence. Or should your country call you, you might pass the northern boundary of the United States, and enter into Canada, and meet enemies there; but you would not, in either case, be influenced by the spirit of a thief or robber, which the law regards as the essential element in piracy. Force or violence is an accompaniment, but not an essential element of the transaction at all. Its essential element is the robber's heart or animus. The pirate is a man who recognizes no compact but that of crime. Grotius gives that definition of it when he says that pirates are connected only "*causa criminis.*" It is the compact of robbery which is their only bond of association. They recognize and know no other. If, therefore, gentlemen, you meet a case where a man commits violence in the acquisition of another's property, but not with the intention of appropriating it to himself, in the spirit of the robber, he may be guilty of some offence, any offence that you choose, but he is not guilty of robbery on the seas, if the act be committed there, or on land, if it be committed there. I say, therefore, that the essential element in the crime of piracy is the spirit with which the act is done. If a man be a pirate, under the law of nations, he goes upon the ocean with the intention of plundering whomsoever he may find. He does not direct his hate solely against this nation or that nation, against this man or that man; he goes there with the intention, not of carrying his prize into a civilized and Christian state, or into a port where it is to be subjected to the determination of honest and learned judges, but of carrying his plunder, dividing and enjoying it, beyond the ken and not subject to the supervision of civilized men. That is the pirate's purpose.

The question came up, not exactly as it here comes up, but it seems to me very much the same in principle, in the case cited from Wheaton by Mr. Earle, and commented upon by my colleague. The point arose there as to the legal aspect of an act of violence on the sea, committed by a citizen of the United States, who claimed to justify it under a commission from one Aury, a Mexican, who styled himself brigadier of the Mexican republic and generalissimo of the Floridas; a title which he used to give color to his proceedings. It was not exactly this case; it could not well be so, because our country was then peaceful and happy: we had no divided Union; no civil war raging within our borders. As I have said, one of the great features of this case, which commends it to the consideration of the jury, and to the careful reflection of each one of us, is, that it is perfectly novel in its character, and you are called on to discharge the most embarrassing duty of applying to an existing state of facts, a law, in its general language apparently meeting it, and yet

evidently not in the mind or intention of the legislature when the law was passed. The case alluded to had respect to what is now unfortunately one of the seceded States, Florida, then in the possession of Spain, and not of the country the officer of which claimed to exercise dominion over it, and to issue from it letters of marque and reprisal. The question before the Supreme Court of the United States in that case involved the legal aspect of the conduct of the defendant, who had acted under one of those letters, and who thereby claimed exemption from the penalties of piracy. What did that court say? There could be no question that, by the law of nations, those letters of marque and reprisal were void. They were not issued by the government *de facto* of the country under which the defendant claimed to act. The question was as to his guilt or innocence; and what did the Supreme Court say? It said, in effect, that every case of piracy is a question of intention; the accused must have the robber's heart, or he is not guilty. You will observe that the question regarded the conduct of one who, in good faith, as it was alleged, had acted under a commission which was void by the law of nations, admittedly so. No valid argument could be used against that position; and yet the guilt of the party did not follow as a consequence, because, as the court thought, there was a question back of that: did the man, in good faith, act under that commission, supposing it to be valid, and had he the robber's heart which would justify his conviction and his death? It turned out that the defendant had gone beyond his pretended authority; and his conviction was sustained on the ground that he had not kept within his authority. If he endeavored to shield himself under a commission from a government which he supposed to be legal, he was bound to conform to the commission of that government, and having transgressed it, he was responsible as a pirate; just as this man would have been, if, under the commission from Mr. Davis, assuming to be President of the Southern Confederacy, he had taken on the high seas, and robbed an English vessel. Had he done so, and been captured, he would have been hanged in England as a pirate. Such a decision there would have been in conformity to that of the Supreme Court of our own United States; but that is not the question here; the question here is not whether William Smith has gone beyond the limits and the fair meaning of the commission under which his vessel sailed. If he had, his commission would have been no justification: because he does not act with good faith, who, professing to act under the terms of a warrant or commission, goes wilfully beyond it, and seizes those who are not within its purview or spirit. But, may it please your Honors, I take it that the decision referred to is one which goes to this effect: that if a man acts in good faith under a commission of marque issued by an existing government, and therefore a government recognized by the law of nations, he is not a pirate or a robber on the sea, by any such code, or by any statute of the United States.

Now, gentlemen, what is this man's case? He was a pilot; he had been born in South Carolina, had gone at an early age, when three, or four, or five years old, to the State of Georgia; he had been educated there; he had served a long apprenticeship at the occupation of a pilot; it was an apprenticeship which involved years of study, and much rough experience. It was an occupation, which, before he could follow it, involved on his part the possesion of sobriety, industry, and honesty. He qualified himself for that occupation and he was making it the means of livelihood. He had married, and had a child to support, and a wife to nourish and take care of. He was following the peaceful pursuits of commerce, and was contributing not only to the wealth of his adopted State, but was giving his services to the people of other States and of other countries, as the commerce of Georgia was carried on chiefly in Northern or foreign bottoms. He is not Mr. Jefferson Davis, or Mr. Robert Toombs, not General this, nor Commodore that, but a poor Savannah pilot, who was faithfully laboring in his avocation, glad to pilot any vessel that came within his reach; not anxious to do anything out of his profession; earning the good will of all his neighbors; when he suddenly finds, without any fault or agency of his—being not a member of any Congress, confederate or otherwise, not a man of war,—he discovers his whole country blockaded; no vessels coming in or out of the familiar waters of his State; with no means of earning bread for his wife and child; a mariner by occupation; he knows more of the sea than of the land; his native and his adopted State are both involved in war; they place their heavy hand upon him, telling him in substance, "come William Smith, you are quite able to fight our battles on the ocean; those Northern men are coming to drive us from our homes and take our property from us; stand by your State and country; if you do not, we will drive you out, with your wife and child, and you may go North and starve there." What could this man do? He did, I think, what most men would have done. Few honorable men, whatever their notions of

political matters, would have fled from their homes. Smith went from Savannah to Charleston. There was a vessel,—I will show you in a moment what her character was. It is necessary that I should turn your attention to some of the documents in this case. You have already, I hope, got the notion of piracy well in your minds; when you understand the official documents that regulated the conduct of this man, you will be able to say whether he went on board of the Jeff. Davis with the felon's or robber's heart; for that is the question you are to pass upon. His State called upon him, under a requisition to which he was compelled to submit; and he enrolled himself, how? In a pirate ship? In a privateer, carefully fitted out by the government of the Confederate States, in a vessel which was subject to military discipline; which had its commander and its lieutenants, its surgeons and its pursers. Aye, from the time he went on board that vessel, he was subject to the commands of the officers and could not leave it without their permission. In other words, he went into the ranks of war—war on the ocean, but none the less war—went, with no intention of robbing any one, but simply to perform his duty as a sailor in the service of the existing government at the South.

Now gentlemen, let me, as I pass along, recall rapidly your attention to the leading facts in this case as they are shown by the evidence. A great revolution, or rebellion, or insurrection had occurred in our Southern country. The President thought it right to use the military force of that part of the Union which stood by him, to put down the organized opposition; and Northern men stepped forward in answer to his summons. The people at the South determined to resist. They thought the course of the Executive unconstitutional, and that it was their duty to resist war by war, or rather force by force. It is not for me to pass any opinion on their conduct; I am not doing so; I am simply presenting in its truth, as I understand it, the case of this man who is before you in peril of his life. Two days after the President, by his proclamation of the 15th of April last, had called out seventy-five thousand men of the bone and sinew of the country to re-possess the property of which the United States had been dispossessed, and to compel submission to her laws, an already organized government at the South, with Mr. Jefferson Davis at its head, issued a proclamation which was the basis of the action of this particular defendant; for on the 17th of April, referring in terms to the proclamation of President Lincoln of the 15th, Mr. Davis, by another proclamation, invited the co-operation of privateersmen, in order to resist what he was pleased to call, the aggressions of the North, and to assist in driving away war from Southern borders. Here was therefore a great community, an immense body of people, exercising all the functions of government, calling upon the residents of that country to render their assistance in the war which was upon them. It was not, we respectfully contend, for William Smith to question the rightfulness of the contest. He was bound to render service. "Render unto Cæsar the things that are Cæsar's." If there was any authority unrighteous, in the "land of Judea," where that language was used, it was Cæsar's; and if ever there was an authority that rightfully required submission to its dictates, it was the authority of the person who uttered that command. William Smith rendered the service which was demanded of him. Soon after the 17th of April, the Congress of the Confederate States, as they style themselves, passed an act, to which I will ask your attention for a moment, in order that you may see whether what Smith did, was done under any notion on his part that when he entered on board the Jeff. Davis, he did it with the intention of committing piracy against the people of the United States. The Southern Congress, by an act which was published on the 6th May, 1861, after the proclamation of Mr. Davis, reciting that "the earnest efforts made by this government to establish friendly relations between the government of the United States and the Confederate States, and to settle all questions of disagreement between the two governments upon principles of right, justice, equity and good faith, have proved unavailing," * * * proceeds to declare that "*Whereas*, the President of the United States of America has issued his proclamation, making requisition upon the States of the American Union for seventy-five thousand men, for the purpose as therein indicated, of capturing forts, and other strongholds, &c.," and then to enact that "the President of the Confederate States is hereby authorized to use the whole land and naval force of the Confederate States to meet the war thus commenced, and to issue to private armed vessels, commissions or letters of marque and general reprisal, in such form as he shall think proper, under the seal of the Confederate States, against the vessels, goods, and effects of the government of the United States, and of the citizens or inhabitants of the States and Territories thereof except the States and Territories herein-before named."

Those States and Territories were the

States of Maryland, North Carolina, Kentucky, Tennessee, Arkansas and Missouri; and the Indian Territory, Arizona and New Mexico.

"*Provided*, however, That property of the enemy (unless it be contraband of war) laden on board a neutral vessel shall not be subject to seizure under this Act. *And provided* further, That vessels of the citizens or inhabitants of the United States now in the ports of the Confederate States, except such as have been since the 5th of April, or may hereafter be in the service of the Government of the United States, shall be allowed thirty days after the publication of this act, to leave said ports and reach their destination."

It provides further,

"That all persons applying for letters of marque and reprisal, pursuant to this act, shall state in writing the name, and a suitable description of the tonnage and force of the vessel, and the name and place of residence of each owner concerned therein, and the intended number of the crew; which statement shall be signed by the person or persons making such application, and filed with the Secretary of State, or shall be delivered to any other officer or person who shall be employed to deliver out such commissions, to be by him transmitted to the Secretary of State. * * * *

"That before any commission or letters of marque and reprisal shall be issued as aforesaid, the owner or owners of the ship or vessel for which the same shall be requested, and the commander thereof for the time being, shall give bond to the Confederate States, with at least two responsible sureties not interested in such vessel, in the penal sum of $5,000; or if such vessel be provided with more than one hundred and fifty men, then in the penal sum of $10,000; with condition that the owners, officers, and crew, who shall be employed on board such commissioned vessel, shall and will observe the laws of the Confederate States and the instructions which shall be given them according to law, for the regulation of their conduct; and will satisfy all damages and injuries which shall be done or committed contrary to the tenor thereof, by such vessel, during her commission, and to deliver up the same when revoked by the President of the Confederate States.

* * * * *

"That all captures and prizes of vessels and property shall be forfeited, and shall accrue to the owners, officers, and crews of the vessels by whom such captures and prizes shall be made; and, on due condemnation had, shall be distributed according to any written agreement which shall be made between them: And if there be no such written agreement, then" in a certain proportion.

"That all vessels, goods, and effects, the property of any citizen of the Confederate States, or of persons resident within and under the protection of the Confederate States, or of persons permanently within the territories, and under the protection of any foreign prince, Government, or State in amity with the Confederate States, which shall have been captured by the United States, and which shall be recaptured by vessels commissioned as aforesaid, shall be restored to the lawful owners, upon payment by them of a just and reasonable salvage," &c. * * * *

"That the President of the Confederate States is hereby authorized to establish and order suitable instructions for the better government and directing the conduct of the vessels so commissioned, their officers and crews, copies of which shall be delivered, by the collector of the customs, to the commanders, when they shall give bond as before provided."

Under that law, instructions were issued to the privateers, and to those instructions I will ask your attention, in a moment. My object in these citations is merely to show you, that there was in the case of this man serving on board the Jeff. Davis, a totally different intention and in regard to him a totally different state of things, from that which exists in the ordinary case of pirates or sea-robbers. The instructions were these:

"The tenor of your commission, under the act," (which I have read.) "a copy of which is hereto annexed, will be kept constantly in your view."

The instructions then proceed to define the "high seas," and further state:

"You are to pay the strictest regard to the rights of neutral Powers *and the usages of civilized nations*, and in all your proceedings towards neutral vessels, you are to give them as little molestation or interruption as will consist with the right of ascertaining their neutral character, and of detaining and bringing them in for regular adjudication in the proper cases."

* * * * * * *

"The master, and one or more of the principal persons belonging to the captured vessels, are to be sent, as soon after the capture as may be, to the Judge or Judges of the proper Court in the Confederate States, to be examined upon oath touching the interest or property of the captured vessel and her lading, and at the same time are to be delivered to the Judge or Judges all papers, charter parties, bills of lading, letters, and other documents and writings found on board; and the said papers to be proved by the affidavit of the

commander of the captured vessel, or some other person present at the capture, to be produced as they were received, without fraud, subtraction, or embezzlement.

"Property, even of the enemy, is exempt from seizure on neutral vessels, unless it be contraband of war.

* * * * * * *

"*Towards enemy vessels and their crews you are to proceed in exercising the rights of war, with all the justice and humanity which characterize this Government and its citizens.*"

Such were the instructions under which this man was marshaled into the service of the Confederate States; and they were carried out in the proceedings of the Jeff. Davis privateer, so far as we have them in evidence, and arguing from what appears to other things of a like nature, you will suppose that those instructions were followed throughout her cruise. You will recollect the testimony which speaks of the manner in which their captives on the high seas were treated. You had some of them here on the stand; you cannot but have admired the candor of those witnesses for the Government, and their manly bearing. After capture "how were you treated?" "Were you put in heavy irons?" "Were your legs locked together by a chain about twelve inches long?" "Were your arms pinioned and ironed, and were you stuffed together in the narrow hold of the vessel?" Oh, no; "we were treated just like everybody else;" "we slept in the cabin;" "we got the best food." Two or three of them said, "it happened to be our own food." I suppose you could not have done them a greater favor, in this respect, than in providing them with their own carefully selected provisions. If that food was not good, it was not the fault of the privateers. They slept in the cabin, where the officers of this privateer slept, and came on deck, when it suited them better. In the hot nights of July, it did suit them better to lie under the canopy of the fresh air of the ocean. They were treated with every consideration; and when their condition became a little uncomfortable, because of the crowd of prisoners, this privateer, having secured a good large ship, placed them politely on board, and actually sent them to one of the Northern ports of the United States, and thus furnished testimony against William Smith, on trial for his life.

Now, I would desire to be informed of "the usages of any civilized nation" that are more conformable to justice and humanity, than this privateer seems to have exhibited in the course of her cruise. I have never had the luck of the company of robbers and pirates; but I have read about them, and I never yet have heard of one such who treated his prisoners as these people seem to have treated their's.

I shall leave the argument of compulsion, generally, where my colleague placed it, without desiring to weaken it in any way by not dwelling on it. It seemed to me to be a powerful one. If there was not physical compulsion, there was that sort of moral compulsion which compels to a certain line of conduct, and which justified the defendant so far as to free him from the imputation of being a sea-robber. How it may affect his character otherwise, I do not think it necessary to inquire, and I do not suppose the jury do; but I say that under the invitation addressed to the citizens of the Southern States, this man took his position on board that vessel, and comported himself in accordance with the instructions he received. Now, I agree, that, if, in overhauling the Enchantress, or the Mary Goodell, or the John Welsh, or any of the other vessels that were met on the high seas, these men had violated their instructions, and had acted towards their captives as was done to them by those in command of the Albatross, they would have been guilty of piracy. I am content to admit it. I think they would, because their instructions were, while they carried on war against the Government of the United States and her citizens, to conduct themselves according to the usages of civilized nations, and to observe the laws of justice and humanity; and they did so. Had they gone beyond their warrant, the decisions of the Courts would have ranked them with pirates, and they must have taken the penalty.

Now, gentlemen, it becomes proper for me to say something in addition even to what my colleague has said on this subject of privateering. From the opening of the Assistant District Attorney and his colleague who summed up the case for the Government, a person who knew nothing about the subject would leave this court house with the impression that a privateer was worthy of any invective you might choose to hurl at him, and that the Government which tolerated privateering was not worthy to be ranked in the sisterhood of civilized nations; and my learned friend, Mr. Earle, whose private opinions are supposed to be well known on this subject —I believe he is a peace man—quoted two or three authors, who advocate "Go in for peace" always and everywhere. There are eminent statesmen who contend that you must not go to war on any occasion or for any cause, as it is always wrong. If you think so, I cannot help it. Gentle-

men, it is not my opinion. I do not think that war is one of the absolute crimes. It may be Mr. Earle's opinion; perhaps not; but he quoted writers who have said so. That is not the state of the law, nor of public opinion, in this country, gentlemen. Privateering is nothing but one mode of going to war; and to capture a vessel on the high seas and treat her crew with tenderness and humanity, to give them good food and comfortable living, and send them to their own homes again in peace and quietness, is not quite as bad, certainly not worse than taking a gun and shooting a man, as happens under the ordinary operations of war. Privateering, I say, is but one mode of carrying on war; and it has been sanctioned by almost every government on earth, and has been especially sanctioned by our own Government; and not only by our own national Government, but by the States of this Union long before they were united under the present Constitution. My learned colleague has presented some portion of the history of privateering; I will add one or two facts only, and, as he has referred to the State of Massachusetts, I will also allude to her. Massachusetts has taken the lead, gentlemen, in several operations in this country. It is narrated—I do not pretend to say so myself—but it is narrated in books that she and some other of the Eastern Commonwealths took a prominent part in the slave trade; and it is also said that she took the lead, as my colleague has attempted to show by citations, in secession, or nullification, or whatever you may call it. She has led off in many public affairs, some very good, and some otherwise; but she appears certainly to have been foremost in privateering. If you will allow me to quote from a book, written, I think, by a Massachusetts man, though published in New York, Hildreth's History of the United States, you wil find that before the Declaration of Independence, and of course long before the formation of the present Constitution, as early, indeed, as the 10th of November, 1775, the State of Massachusetts passed a law to authorize the fitting out of privateers and to establish a court for the trial and condemnation of prizes. If any one feels an interest in the citation, he will find it at the 101st page of the 3d vol. of Hildreth's History of the United States. That law, preceded, by fifteen days, the action of the old Continental Congress upon the same subject; for it was on the 25th of November, 1775, that the Congress passed a law authorizing privateering. Massachusetts was two weeks ahead of Congress, and she passed a law to institute and encourage privateering.

The history of this country has taught us that Massachusetts did not stand alone in this act; her lead was followed by other States; her lead was followed by our own Commonwealth. The Continental Congress encouraged the practice. One of the greatest men that has ever adorned the naval history of this country earned his fame partly as a privateer, partly as an officer in the Continental navy; and the naval history of this country is brilliant with his achievements. We know very well the testimonials which have been offered to him. I happen to hold in my hand the life of John Paul Jones. You will find that it is preceded by laudatory notices from James Madison, Thomas Jefferson, and Joseph Story. It is Sherborn's life of that chevalier, as he was styled, and his virtues and his glory are there commemorated largely.

The best argument, however, in a court of law, perhaps, is, that our national statute book contains existing laws in regard to privateering, which sanction it. There were acts in 1812 that have since expired; the existing laws on the subject date from the year 1813, during the war with Great Britain; and any man, therefore, who rises in a Court of the United States, and attempts to brand another with disgrace or crime, by reason of his having been a privateersman, casts an imputation not only on the naval history of his country, but on her statute laws. I say this, without fear of contradiction; and so far, therefore, from you having an impression injurious to this defendant from the fact that he accepted office under a privateer's commission, you ought rather to say, (independently of the other questions of the case, but looking simply at that of privateersman or not,) that he did good service to his country.

Now, gentlemen, let us look at this matter a little more closely. I have detained you somewhat with expositions upon the subject of the law of piracy, and the history and character of privateering. Just ask yourselves a plain, practical question: what is the difference in principle between fighting us on the ocean and fighting us on the land? Why is it that this man, who went upon the ocean to fight the battles of his existing government, should be brought before you as a jury, and branded as a felon and a pirate? Why is it that he should be selected, and the officers of rank and station who have been taken by our army at the South, should be treated, practically, as honorable prisoners of war, and many of them discharged on their parole of honor? Why is it that the vengeance of this great government should settle on the head of William Smith, as a felon, a pirate, a sea robber, who is to be consigned to a felon'

death on a gallows, and those men of rank and character who upon the land fight us, not a whit more bravely, or honorably, or humanely, than this man would have fought us, should be discharged on their parole of honor, the simple word of a gentleman? Why is it that they shall return to their homes and enjoy their firesides, upon their promise not to bear arms again against the United States of America, as discharged prisoners of war? And this poor man is to be dragged into this court, and after your verdict, be hanged on a gallows? Is not he as much a belligerent as they? Is he not in reason entitled to be treated as a prisoner of war as much as they? Why do they not send home, on his parole of honor, William Smith, to a suffering wife and child? Why send home, or retain as mere prisoners of war, this commodore or that captain, and keep William Smith here in irons, as he was until he came beneath the panoply of this court, when those irons indeed fell from him, and they were restored, to whom? To the commander of a vessel of the United States, as the property of the United States The Marshal could not keep the fetters; they belonged to the national ship; and William Smith comes into court with the marks upon him of those irons, which had worn into his very flesh, through weeks of torment. This is to be the conduct observed towards him! Why, gentlemen, it makes the blood boil, when we think of these differences and distinctions. If we are in a civil war, let us war like Christian men, and fight our opponents like brave and honorable men; for I tell you that mercy and kindness are ever constituent elements of truth, bravery, and honor.

Such is the practical question for you. I say if we are to initiate the system that has been suggested to us by the government in this case, we must erect a line of gallows that shall extend from Philadelphia to the banks of the Potomac; but, let me add, that for every man hanged here, there will be ten executed at the South; there will be an opposition line of gallows reaching from Richmond northwards; they have many more prisoners than we hold; and I predict, if William Smith shall be executed on account of the offence with which he is indicted, that there will go up to Heaven a wail from Castle Pinckney that will be heard even on the banks of the Delaware. There will be reprisals and retaliations, and that state of things which a learned and humane writer, on the law of nations has so earnestly deprecated. There is no greater authority on the subject than Vattel, the Frenchman who wrote the book which I now hold. The 18th chapter of the 3d book of his great work is devoted to the subject of civil war. I commend it to the perusal of each one of you. He discusses the question not only of subjects rebelling against a monarchy; but of a revolution, insurrection or rebellion in a Republic: and he lays it down as part of the acknowledged law of nations, that when a civil war takes place in a country, that law requires that the combatants on either side shall conduct themselves according to the established, well settled rules of Christian, civilized warfare. He says, it has been the usage or the talk of persons in power, to treat all that resist their authority as rebels.

Gentlemen, in reading this work, and in looking over some of the prominent newspapers of the present day, one would suppose, that the latter had copied their sentiments from the parties to whom Vattel refers. He says in substance, that it has been the fashion of every existing Government to say when a rebellion, or insurrection occurs, "you are all rebels, or traitors; we will hang you or shoot you." Such is the not uncommon language of this day in reference to our own opponents. But what does Vattel say in answer? Such is not the sense of civilized Europe; it is not the code of laws which regulates the intercourse of nations. What is the necessary consequence of the opposite doctrine? Who can tell which, in the ordering of Divine Providence, may be the stronger party? The stronger party in the end will visit reprisals with vengeance indeed, on the heads of those who inaugurated such a system; and if the majority begin by shooting and hanging the minority, and ultimately the minority should become the majority, there will be few of the conquered whose heads will not be cut off, or whose necks will not be broken; for it is not in man's nature to resist such an inducement to vengeance. I tell you, gentlemen, that you are now asked to initiate in this happy and free land of ours as it was a short time back, a system at which the subjects of the monarchies of Europe would turn pale. They have not the hardihood to proclaim such a doctrine as this.

Their writers say with one voice, as your rebellious citizens are able to frame a government of their own, and claim, whether right or wrong, to stand on the same platform with yourselves; as they have organized a government, and administer its laws, according to their notions of justice and propriety; as they have the capacity to raise and equip fleets and armies, and to meet you on your own soil in battle; it is not important in the view of the law of nations to consider whether they or you are

right; you must be governed by a universal law; a higher law if you choose so to call it; the law of humanity and of justice; they will tell you that, if you initiate any other system, the day of peace, of Christianity, and of comfort has gone far from your land, and your fields will be filled with the dead bodies of your people, and your rivers will flow with torrents of their blood.

Is this an indictment under the law of nations? If so, that law is too clear to sustain it. I ask my learned friend who is to follow me, to point out any one writer on that code who says that one who goes forth in good faith, on the ocean, under a commission in a privateer vessel, to make war on the enemies of his existing government, is held or treated as a robber or a pirate. I believe that no such authority can be found. You recollect, that when such an attempt was made in the Supreme Court of the United States, in a case much less sustainable than the present, the learned Judges of that Court were careful to abstain from any such opinion.

In order to convince you, that I have not misinterpreted the views of Vattel, I will cite a few passages from the chapter of his treatise, to which I have especially alluded. They are as follows:

"It is a question very much debated whether a sovereign is to observe the common laws of war towards rebellious subjects who have openly taken up arms against him? A flatterer, or a cruel ruler immediately says, that the laws are not made for rebels, for whom no punishment can be too severe. Let us proceed more mildly, and reason from the incontestible principles above laid down. * * * *

"Popular commotion is a concourse of people tumultuously assembled, who resist the voice of their superiors, whether their design be against those superiors themselves, or only some private persons. * * * When the evil spreads, infecting great numbers in the city or provinces, and subsists in such a manner that the sovereign is no longer obeyed, such a disorder, custom has more particularly distinguished by the name of *insurrection*. * * *

"When a party is formed in a state, which no longer obeys the sovereign, and is of strength sufficient to make head against him; or when in a republic the nation is divided into two opposite factions, and both sides take arms; this is called a *civil war*. Some confine this term only to a just insurrection of subjects against an unjust sovereign, to distinguish this lawful resistance from *rebellion*, which is an open and unjust resistance; but what appellation will they give to a war in a republic torn by two factions, or in a monarchy between two competitors for a crown? Use appropriates the term of civil war to every war between the members of one and the same political society. If it be between part of the citizens on one side, and the sovereign with those who continue in obedience to him on the other; it is sufficient that the malcontents have some reasons for taking arms, to give this disturbance the name of *civil war*, and not that of *rebellion*. This last term is applied only to such an insurrection against lawful authority, as is void of all appearance of justice. The sovereign indeed never fails to term rebels all subjects openly resisting him; but when these become of strength sufficient to oppose him, so that he find himself compelled to make war regularly on them, he must be contented with the term of civil war. * * * * * * *

"Things being thus situated, it is very evident that the common laws of war, those maxims of humanity, moderation, and probity, which we have before enumerated and recommended, are in civil wars to be observed on both sides. The same reasons on which the obligation between state and state is founded, render them even more necessary in the unhappy circumstance when two incensed parties are destroying their common country. Should the sovereign conceive he has a right to hang up his prisoners as rebels, the opposite party will make reprisals; if he does not religiously observe the capitulations, and all the conventions made with his enemies, they will no longer rely on his word; should he burn and destroy, they will follow his example; the war will become cruel and horrid; its calamities will increase on the nation. The Duke de Montpensier's infamous and barbarous excesses against the reformed in France are too well known: the men were delivered up to the executioner, and the women to the brutality of the soldiers. What was the consequence? The reformed became exasperated—they took vengeance of such inhuman practices; and the war, before sufficiently cruel as a civil and religious war, became more bloody and destructive. * * * * * Even troops have often refused to serve in a war wherein the prince exposed them to cruel reprisals. Officers who had the highest sense of honor, though ready to shed their blood in the field of battle for his service, have not thought it any part of their duty to run the hazard of an ignominious death. Therefore, whenever a numerous party thinks it has a right to resist the sovereign, and finds itself able to declare that opinion sword in hand, the war is to be carried on between them in the same manner as between two different nations; and they are

to leave open the same means for preventing enormous violences and restoring peace.

"When subjects take up arms without ceasing to acknowledge the sovereign, and only to procure a redress of grievances, there are two reasons for observing the common laws of war towards them. First, lest a civil war becoming more cruel and destructive by the reprisals, which, as we have observed, the insurgents will oppose to the prince's severities. 2. The danger of committing great injustice by the hastily punishing those who are accounted rebels: the tumult of discord, and the flame of a civil war, little agree with the proceedings of pure and sacred justice: more quiet times are to be waited for. It will be wise in the prince to secure his prisoners till, having restored tranquility, he is in a condition of having them tried according to the laws."

Gentlemen, I have little more to say to you about this case. It is, as I have before said, one not only of gravity but of difficulty. I know it to be difficult, in a court of the United States, to argue against the language of a statute of the United States. I know it will be pressed upon you that the plain words of the law are these: "Any person who commits robbery on the high seas, shall be punished with death." I know you will be told that William Smith is a pirate; that he did an act which contains the essential elements of robbery; that is, he took property on the sea by force. I am not disposed to cavil about small matters. There is no question that the Enchantress yielded herself to a superior force; there is no question that that pivot gun, and those waist guns, and those armed men, and the cutlasses, and the pistols, and the muskets, all induced her capture. There is no doubt at all that she was taken with force and violence, and that her men were confined, and that she would have been treated, if carried to port, as a prize of war. There is no question that they literally ran away with the captured vessel; and that they put a prize crew on board. It was necessary by the laws of nations to do this; their instructions required it. This placing on board a prize crew, which has been dwelt upon, was one of the very items of instruction under which they acted. They were to take the Enchantress where? To the isles of the South, or into solitary haunts of robbers and pirates, not showing themselves in the face of civilized men? Were they to do this? Not at all. This prize crew was put on board, and they were directed to go to Savannah, to Charleston, or to New Orleans, ports of our own country. They were to hand her over to a court of justice there; to surrender the papers; to libel this vessel for condemnation; they were to do in their Courts what is done every day in this Court when *our* vessels bring in a prize. With us, a commissioner is appointed by the Court, who takes the testimony. The same formalities would have been gone through in her case; the distribution would have been made under the decree of a Court; and William Smith would have received only what the laws of his existing government would have accorded to him. If their Honors shall say that they must, as Judges of the United States, shut their eyes to the fact that we are in a civil war—that you, gentlemen, must shut your eyes to the fact that there is a great government at war with us—that in the South there is an existing government which administers its own laws in its own way, and that the laws of the United States are not administered there—that there is an army and a navy contending with us; and that you can know none but citizens of the United States, and no government but the government of the United States—that every man south of the Potomac who is caught on the land in arms against us, or on the sea under their privateer commissions, is to be treated as a citizen of the United States engaged in robbing his fellow-citizens—if you are to take only that narrow view of the law, and close your eyes to this great chapter in the history of nations, so like to what is everywhere to be read on its pages, and if, I say, a Court of the United States is to declare, as a consequence of all this, that William Smith must be hanged by the neck, let it be so; God have mercy on him!

But I trust, gentlemen of the jury, that the honorable Judges on the bench will tell you that although they sit to administer the law of the United States, they do not shut their eyes to the reason and spirit of the law, and that they will say it had no application to a case such as this; that it has reference to robbers who act without pretence of commission or authority from a State, and that therefore the case of William Smith is entirely out of the written statutes of the United States. If it should please Congress to pass a law touching the subject-matter, it must do so in reference to future transactions alone.

I knew that in a Court of law, unless I can present an argument which commends itself to the judicial mind, all other suggestions are of little account; and I have no desire to induce these gentlemen who are before me, to give a verdict against the reality of the law. I have a right, however, in a criminal case, to persuade their judgments, that the law is as I have argued

it to be, they being influenced, of course, by the opinion of the Court. Bearing then upon this question and feeling its interest and importance, I draw your Honors' attention, and that of the jury, to the fact that the government of the United States has made a distinction between ordinary piracy, and piracy under the color of a commission from another government. There is a statute which draws that distinction. I do not intend to go now into a discussion of that statute. I had supposed that the government might frame its indictment under it; but it has not; and I simply refer therefore to the ninth section of the Act of April 30th, 1790, for the purpose of showing that that law of the United States is framed on the presumption of a necessity to distinguish between the case of acting under a commission, and of not so acting; and that where a party proceeds under a commission from a foreign power, he is not because of that, a pirate at all; to render him such, he must be a *citizen of the United States*, acting under the authority of a foreign government, and by virtue of that, joining in the war upon other citizens of the United States; for, as the Supreme Court of the United States has said in United States *v.* Wiltberger, 5 Wheaton, 99–100, the whole purpose of that Act was to prevent citizens of the United States from accepting privateers' commissions from foreign governments and then making war upon their fellow citizens in breach of their allegiance. So far, however, from condemning privateering, that law impliedly recognizes it; though upon that subject we have as I have said, what are more satisfactory than a mere implication, existing laws of the United States.

Gentlemen, I have done with my suggestions and my argument. I need not say to you in conclusion, that this man's fate is with you. If this be a new case, as I suppose it to be; if it be a doubtful one, as I suppose it to be; in God's name, give this man the benefit of that doubt. Where men like Mr. Calhoun and Mr. Webster have differed; and where men like the latter have differed with themselves at different periods of their own lives; where learned jurists have differed, and where that difference still exists, inducing all our troubles, distracting many a man's mind, and puzzling many a good man's conscience, it is very hard indeed, gentlemen, that one like William Smith should pay for his error of judgment with the forfeit of his life. It is a fearful thing to think of. I know that justice must be done though the heavens fall; and that individual hardship is never an argument against the application of law; but I say that it is a great consolation to counsel when they come into Court to defend a prisoner at the bar of a criminal court, to know, that whatever may have been his conduct, and whatever the penalty for that conduct, his client can go out of Court and perhaps out of the world, with the conviction of the purity of his motives; that if he has erred against government in such way as to call for so heavy a forfeit, he made at least an honest mistake; and if he is to hang, it will be in obedience to the better judgment of persons who are more learned and more intelligent than himself, but not a whit more honest at heart.

Mr. Kelley —With submission to your Honors —Gentlemen of the Jury,—More fully than any man in this crowded court room, can I appreciate the sincerity of the expression of diffidence with which each of the gentlemen who have preceded me, has commenced his remarks. The case is, as has been said to you, a grave one, and in our courts a novel one. It may, therefore, well impress each one, acting as counsel either on behalf of the defendant or the government, with a sense of his own insufficiency. But, to me, this is peculiarly so: for I am here as the representative of a friend upon whom providence has laid its hand sorely,—one who while yet in the enjoyment of health had given to this case the care and attention it deserved from a man full of energy, devoted to the honor of his profession and the duties of his office, possessing an intellect at once subtle and grasping, highly cultivated in the schools and thoroughly disciplined by the conflicts and labors of a successful professional career. As the friend of the District Attorney, George A. Coffey, Esq., I appear to represent the government and to utter the concluding words of counsel in the case; and I could well wish that the position had fallen to another. But the duty is upon me, and I will perform it to the best of my ability.

I propose first, gentlemen, to ask you to go hastily with me over the leading points in the testimony,—not to repeat the language of the witnesses, but to give you the evidence in substance. On the first day of last July, there sailed from the port of Boston, the schooner Enchantress, an American vessel having American papers and the American flag, chartered by an American merchant, and carrying as cargo the property of American citizens. The cargo was to be exchanged at St Jago de Cuba, and she was to bring by a circuitous voyage, to its owners the just results of their enterprise. The story of her voyage until the sixth of the month, is brief and unimportant. Observing a sail in sight on the after noon of that day, her officers shaped her course so that she came near to the vessel. There floated at the mast-head of the stranger, the flag of France, a nation at peace with their own. They came near her, feeling that there

were friendly hearts on board. When they had come within the proper distance for such a purpose, they were hailed and found themselves under the range of the guns of an armed brig, from the deck of which they were ordered to heave to; and as they passed around her bow to a position of safety for compliance with that order, a long eighteen-pounder, a pivot gun, kept them in range. Thus under constraint of overwhelming force, the schooner hove to. William Smith, the defendant, was on board of the vessel that thus brought her under the power of its guns and thus constrained her to surrender her voyage and lay to. The Enchantress was soon boarded; her papers demanded and surrendered; her crew sent on board the stranger vessel, the captain, his son a lad, and the mate, alone left in possession. In a little while, the boat that had borne the crew away, returned, bringing back one of the number, a native of the Danish West Indies, who had left the port of Boston under the protection of the American flag. Why did he return? The boat came to carry away the officers and the boy that had been left behind. Why did it bring Jacob Garrick back? He was sent back because he was not wanted on board the pirate brig, and because he would, as merchandise, bring $1,500 in the port of Charleston! So the witness Page, has told you. He left the deck of the Enchantress a man, and before the clock had struck returned to it a merchantable thing for a market. The captain, mate, and boy were now ordered to the boat; they obeyed the order; then where went our Enchantress with her American papers, American flag, and American merchandise? Where went the ventures of your fellow-citizens? They were now destined for a market nearer than St Jago de Cuba, to be reduced to dollars and cents, that William Smith, the defendant, might receive his appointed portion of them,—the price of the schooner, merchandise, man, and all!

These are, briefly, but I think clearly told, the essential facts of the voyage, so long as the Enchantress remained in charge or in any possible or constructive possession of her officers. Was robbery perpetrated then and there? I ask this question now, because the question before you is, was this defendant guilty of piracy under the laws of the United States; and if there was a taking of property under these circumstances, for which no legal justification has been shown, there was robbery; and he was guilty of the crime charged. The sole question for you to decide, I repeat, is, has this defendant been guilty of piracy under the laws of the United States,—not under the common law,—not is he the general enemy of the human kind,—not has he the highwayman's heart and habits;—but are you as a jury, satisfied that he has violated the laws of the United States for the prevention and punishment of piracy. In connection with the facts referred to, you have also learned that the vessel which brought the Enchantress to and took off her crew, was heavily armed; that her cabin was stacked around with bayonetted muskets, double barrelled fowling pieces, boarding pikes, and pistols; and that there were a hundred men on board of her. Nine, says one of the witnesses, had been sent on board of my vessel that morning, and when the Enchantress was taken there were, I think, seventy-three left. We heard also of crews having gone on board of other vessels from this brig now known to us as the *Jeff. Davis*.

The law of the United States to which you are to apply the facts of the case, has been read to you, but I will take the liberty of reading it again. Its terms are simple and express. My learned friend who with so much power closed for the defendant (Mr. Wharton), admitted that the case seemed to be within the letter of the law, and his argument to you was that it was not within its spirit if you would kindly ascertain that spirit by the aid of certain facts which appeared to have great weight upon his mind. The letter of the law and its interpretation, as you will receive it from their Honors upon the bench will, I apprehend, guide you, and I will therefore best perform my duty by calling your attention to its letter. It is:

"If any person shall, upon the high seas, or in any open roadstead, or in any haven, basin, or bay, or in any river where the sea ebbs and flows, commit the crime of robbery in or upon any ship or vessel, or upon any of the ship's company of any ship or vessel, or the lading thereof, such person shall be adjudged to be a pirate."

Now, gentlemen of the jury, what are the defences set up to this charge? The facts as they stand seem in my judgment, to make out as clear a case of piracy as ever was made out. To it, what are the defences? First, you are told that this man was not voluntarily there, that he was there under duress,—restraint. It is argued, and you are persuaded to infer, that he would gladly have escaped if he could, for if that is not true his duress or restraint was not such as the law recognises. How did he come to be there? If you may believe his own witness, Edward Rochford, one of his companions in crime, who is, like himself under indictment, the day before the body of the crew left the port of Savannah, he was seen upon the steps of a hotel, valise in hand, apparently at liberty. He traveled by railroad to the city of Charleston, and there he went on the *Jeff Davis*, and after some days she went to sea with him on board. If the argument, and the facts from which it is attempted to be deduced, establish duress in his case, they apply to every man on board that vessel, and we are left to wonder why it is that the *Jeff. Davis* did not immediately come north, and the defendant and his worthy comrades find freedom from such outrageous restraint! With a hundred men, she sailed to sea on the 26th of June. What vessel she captured or what course she pursued on that day, or the

next, or the next, we know not; we begin to learn these matters only on the afternoon of the 6th of July, and we then discover what she had done in the morning of that day as well as what she did in the afternoon. I say the argument that the defendant was on board the *Jeff. Davis* under restraint, applies to every man on board, for the idea upon which it rests is that there was some law or supposed law that compelled him to go. He was there, however; and to get there he had traveled by rail, valise in hand, from Savannah; he had remained on board for weeks and there is no allegation that he had attempted to escape; but it appears that he did leave the *Jeff. Davis* on the 6th of July, and went as prize master on board the Enchantress. Here he had a prize crew of four and one prisoner, Jacob Garrick the colored man. Which way did he steer that vessel? Did he now, when he was the master of his position, attempt to escape the service to which he had been constrained and to which he was so unwillingly held? Oh, no. When he took charge of the *Enchantress*, she was two hundred and fifty miles south-east of Nantucket South Shoal, and when she was re-captured by the *Albatross*, she was in the neighborhood of Hatteras. But again: Where had he talked of taking her? Where had he thought of taking her? Where did he wish to take her? The witness tells you, he spoke first of going to Savannah, and then he changed his mind and proposed to take her to a place called Bulls, about twenty-five miles from Charleston, and whence she could be towed to that city by a steamer. Had some evidence of original duress been exhibited, what would it weigh against this absence of effort to escape, this persistent and vigorous performance of a pirate's duty? The law defines this matter of the measure of duress, which will relieve a man from the consequences of his criminal act—no recent law; it is not a new question. In Foster's Crown Case, chap. 2, sec. 8, p. 216, of the London edition of 1792, the law is given thus:

"The joining with rebels in an act of rebellion or with enemies in acts of hostility, will make a man a traitor; in the one case within the clause of levying war, in the other within that of adhering to the king's enemies. But, if this be done for fear of death, and while the party is under actual force, and he taketh the first opportunity that offereth to make his escape; this fear and compulsion will excuse him. It is however incumbent on the party who maketh fear and compulsion his defence, to show, to the satisfaction of the court and jury, that the compulsion continued during all the time he staid with the rebels or enemies."

Let me illustrate this law by a case—McGrowther's case, which was tried in 1746.

"In the case of Alexander McGrowther, there was full evidence touching his having been in the rebellion, and his acting as a lieutenant in a regiment of the rebel army, called the Duke of *Perth's* regiment. The defence he relied on was, that he was forced in. And to that purpose he called several witnesses, who in general swore that on the 28th of August, the person called the Duke of *Perth* and the Lord *Strathallan*, with about twenty Highlanders, came to the town where the prisoner lived; that on the same day three several summonses were sent out by the Duke requiring his tenants to meet him and to conduct him over a moor in the neighborhood called Luiny Moor; that upon the third summons the prisoner, who is a tenant to the duke, with about twelve of the tenants appeared; that then the Duke proposed to them that they should take arms and follow him into the rebellion; that the prisoner and the rest refused to go; whereupon they were told that they should be forced, and cords were brought by the Duke's party in order to bind them; and that then the prisoner and ten more went off, surrounded by the Duke's party.

"These witnesses swore that the Duke of *Perth* threatened to burn the houses, and to drive off the cattle of such of the tenants as should refuse to follow him.

"They all spoke very extravagantly of the power lords in *Scotland* exercise over their tenants; and of the obedience, (even to the joining in rebellion,) which they expect from them."

Somewhat analogous it may be supposed to the power exercised over the people of the south by themselves, or the masters they have set upon their backs, who liking their seats make them show their paces. But to the case. In summing up, the Lord Chief Justice said in response to these arguments:

"The fear of having houses burnt or goods spoiled, supposing that to have been the case of the prisoner, is no excuse in the eye of the law for joining and marching with rebels.

"The only force that doth excuse is a force upon *the person*, and present fear of death; and this force and fear must continue all the time the party remains with the rebels. It is incumbent on every man who makes force his defence, to show an actual force, and that he quitted the service as soon as he could, agreeably to the rule laid down in *Oldcastle's case*, that they joined *pro timore mortis*, and *recesserunt quam cito potuerunt.*" Foster's Crown Cases, pp. 13, 14.

Under this law, and it is indisputable, what becomes of the argument of duress? The defendant could have returned the Enchantress and her cargo to their owners, and received the "God speed" of his country, and the proud and tender expressions of love and gratitude of his "Northern wife, and boy at a Northern college," for his act of honesty and patriotism. It was then open to William Smith, the prize master, to pursue the course of the humble man, Jaco Garrick, who saw before him worse than death, and when the Albatross approached, threw himself into the ocean, that at the cost of his life, if need be, the Enchantress should be restored to her

country, the property on board to its owners, and he escape the outrages and unrequited toil, that $1,500 (to be divided among the pirate crew,) were to entail upon him, and his posterity. But where is the evidence of Smith's desire to escape, his honesty, patriotism, or any redeeming element of character—the love even of wife and child, whom he could have visited so gratefully with his protection, in this season of turbulence, distraction, doubt, and danger? What one generous or honest impulse seems at any time to have possessed or impelled him? No, gentlemen of the jury, the suggestion of duress will not avail: indeed it is not the defence in this case—it is but dust for jurors eyes. The defence upon which counsel rely is that their client acted under a commission, a letter of marque, and I proceed to inquire whether they have established this fact.

A letter of marque is a commission granted by an established government to the commander of a merchant ship or privateer, to cruise against and make prizes of the enemy's ships and vessels, either at sea or in their harbors, under pretence of making reprisals for injuries received; and let me, at the outset of this inquiry, premise that you have not heard that sort or measure of evidence, which, despite all the difficulties that surround the defendant's case, ought to have been produced to show that there was a letter of marque, real or pretended, on board the Jeff Davis. There is, I aver, no evidence that there was a genuine letter of marque from any government or pretended government on board that robber craft. The prosecution freely admits that the presumption, deducible from notorious facts, is that there was in the possession of one of her officers, a paper purporting to be such a letter; but so far as this case is concerned, the offer of evidence in support of the allegation was to the last, degree slender and feeble. One of the defendant's confederates in crime was called to show, that while on board, he heard what purported to be such a paper, read. He seemed to have a pretty distinct recollection of the fact, much more definite indeed than he had as to facts nearer to him, as for instance as to what share of the plunder he was to get! He had heard that subject "a little talked about," "somewhat discussed," but he did not know precisely what share he was to get! He had been led to believe, however, that it was to be divided among them.

The spectacle now presented is one of the most extraordinary, and I think one of the most sublime ever beheld by man. We are in a court of justice of the United States, trying a cause quietly, courteously, and with a tender regard for the rights of the defendant, at a time when 300,000 of our brothers and friends are armed and on the tented field,—and when, as has been said to you every mail brings the tidings of the death of some loved or honored one. We are trying a man who comes from a section of our own country, in which, to profess a love for the United States, its government and its flag, not only suspends the the habeas corpus in the particular case, but seems to suspend all law, human or divine, curdles and paralyzes all generous emotions and manly instincts, and inflicts even upon gentle woman, such brutal punishments, as only barbarous nations apply to hardened malefactors; sparing their lives, it may be, but sending them to their homes with shaven heads, excoriated backs and limbs, and other enduring badges of degradation and shame. And what defence is set up, and how is it received? It is that this defendant was aiding the cause of those who are arrayed in arms against our brethren; that he was aiding the cause of those who thus punish our people for loyalty to their government; that he was aiding the cause of those who have stricken down and dishonored the flag of our country, and made war upon its institutions and its people. And that defence is pressed and listened to, and weighed, and strengthened even by presumptions. It is right that it should be so. Such scenes as this, will redeem our generation in history. They prove that it is not our democratic republican institutions, that have begotten a tendency to barbarism among a people once civilized, generous, and humane; that the love of law and order, justice, truth, and right, still dwells in the hearts of the American people, and are the sure pledge of the ultimate realization of the best hopes of those who have most faith in man's capacity for self-government.

Men have a right to change their form of government, says the learned counsel (Mr. Harrison,) and the remark discloses the cardinal point of the defence. Yes, men have a right to change their government. That argument is not novel; it has been made before, under somewhat similar circumstances, and I thank his Honor, Judge Cadwalader, for having in an opinion cited this morning by my learned adversaries, called my attention, to the reply it has elicited.

Says Lord Chief Justice Eyre, in Hardy's case:

"It was observed to you by the leading counsel on the part of the prisoner (to whom I am always desirous of paying attention), and the observation was repeated, that a people had a right to alter their government. That proposition, under certain circumstances may be true; but it ought not to have been introduced into a court of justice, bound to administer the law of the existing government and to suffer no innovation upon it. I did not interrupt the learned counsel when he stated this proposition, because I did not wish to stop him, or to disconcert the chain of his argument; but having passed it by upon that occasion, I feel it my duty to notice it now, because it can have no relation to the business before us, because it tends to unsettle men's minds, to bring on a thirst for innova-

tions, and to shake all the foundations of government." 24 *State Trials*, 1371; *Trial of Thomas Hardy*.

We, gentlemen of the jury, have not changed our government. We live under the Constitution and laws of the United States. We are here to maintain that Constitution, and to enforce those laws. We have not joined what my learned brother Wharton says is now recognized not only as a rebellion but as a great rebellion; and it ill becomes a member of our Bar, sworn to support our Constitution and our laws, to put in the defence that some people think they have changed our government. Nobody denies the right of revolution; but it does not exist every day, and extend to all people under all circumstances. The eloquent gentleman, (Mr. Harrison,) quoted Mr. Webster on this point. Let us see if Mr. Webster puts tno limitations to the right. He said:

"If the gentleman had intended no more than to assert the right of revolution for justifiable cause, he would have said only what all agree to; but I cannot conceive that there can be a middle course between submission to the laws when regularly pronounced constitutional, on the one hand, and open resistance, which is revolution or rebellion, on the other."

Even here, in the learned counsel's chosen passage, justifiable cause is said to be a pre-requisite to the right of revolution. I have shown you that it has ever been held that it is not a proper defence to offer in the court of the existing government, the laws of which are being administered. When then can it be set up? Has the time come with us? Has there been a revolution that has overthrown our government? Is there a government peaceably established on its ruins in any part of its territory that has issued a letter of marque to these people? These questions you must decide in passing upon the defence set up. And in deciding them, gentlemen of the jury, you will decide so far as in you lies, whether the U. S. Constitution is still extant; whether the American people still have a government. For if the letter of marque in question (conceding that there was one,) is a sufficient justification of the crime charged, the United States government is at an end, and that which we have so confidently believed to be enduring, perpetual, a thing to bless mankind while time should flow, has passed away and is at an end. If this be true, our Republican institutions have been a delusion, as fleeting as it was resp'endent with promise. Let us see whether I am right in this. Turn with me to a recent opinion of his Honor, Judge Cadwallader, quoted by my learned brother. Let me quote a brief passage, the argument of which you will perceive is sustained by numerous citations from the highest authority known to American courts:

"The States which compose the Constitutional Union, are not, with reference to it either foreign or independent States. The several States are, it is true, independent of *one another*. They are also independent of the government of the United States, except for such purposes as the Constitution specifies. But, for all the specific purposes for which it was adopted, the States are, with reference to the United States, dependent and subordinate, and not foreign States. In the Constitution, the word 'foreign,' occurring in five clauses of the original instrument, and once in the amendments, is always used in such a sense as to exclude its applicability to a State of the Union, or to anything appertaining to one. The States, therefore, though for some purposes foreign to one another, are, for all national purposes embraced in the Constitution, united under a government which is both independent and supreme." (6 Cranch, 136; 6 Wheat. on 381; 2 Peters, 590; 12 Peters, 720; 21 Howard, 517.) *Decision in case of ship General Parkhill*, p. 7.

You perceive that his Honor recognizes the Constitution of the United States as what its letter declares it to be, the supreme law of the land, by which the Judges in every State are bound, anything in the constitution or laws of any State to the contrary notwithstanding.

The doctrine of State sovereignty is broached in this case, and the right of a State to secede is argued, and, with equivocal qualification, asserted by all the counsel. Whence is it drawn? What sentence or paragraph of the Constitution implies it? Look through that instrument, take it line by line, section by section, article by article, and say where the most astute of southern or northern statesmen find the text or principle upon which the doctrine of State sovereignty, and the right to secede, is based? Every section refutes the doctrine. Take, for instance, a part of the 1st Article:

"Congress shall have power,

"To lay and collect taxes, duties, imposts and excise, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises, shall be uniform throughout the United States.

"To borrow money on the credit of the United States.

"To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

"To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies, throughout the United States.

"To coin money, regulate the value thereof, and of foreign coin; and to fix the standard of weights and measures.

"To provide for the punishment of counterfeiting the securities and current coin of the United States.

"To establish post offices and post roads.

"To promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.

"To constitute tribunals inferior to the Supreme Court.

"To define and punish piracies and felonies committed on the high seas, and offences against the law of nations.

"To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.

"To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years.

"To provide and maintain a navy.

"To make rules for the government and regulation of the land and naval forces.

"To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions."

So it proceeds, through a series of clauses, to limit the power and sovereignty of the several States, by giving to the general government all those powers which are essential to every well-regulated nation. But lest all this might not be sufficient to establishment beyond argument the subordination of the States, there was, as if to provide for this case, embodied in the 10th section of the same article, this paragraph:

"No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility."

But, gentlemen, take the Constitution with you; look at it line by line, and section by section; and though on every page you will find the evidence that it was to be the supreme law of the land, you will nowhere find the point upon which ingenuity can hang the argument that each State was sovereign, and the United States government subordinate; that it was a temporary compact or treaty of peace between neighboring sovereigns, which could be broken whenever any of the parties to it became impatient of its restraint. It was a government ordained by a people and invested with power to enter into treaties with the governments of other nations, and to maintain itself against the assaults of foreign or domestic foes.

My learned brother, the senior counsel for the defendant, (Mr. Wharton), said well that the present circumstances could not have been anticipated by the men who framed our government. No, for while the Constitution provides for the suppression of rebellion, and its own peaceable amendment, it purports to be a bond of perpetual union. The founders of the government could not have foreseen the present state of affairs. Gifted as they appear to have been with prescience, they could not have imagined that an American citizen taken in the act of piracy as defined by a law of Congress, should come into court and through learned counsel sworn to maintain that Constitution which ordains that Congress shall have power to grant letters of marque, and provides that no State shall grant letters of marque, ask an acquittal because the act was perpetrated under such a letter granted by a State or a combination of States.

The Constitution is still, thank God, the supreme law of our land under which we are to try the cause, and its very letter, with wise forecast, proclaims the inefficiency, the illegality, the utter worthlessness of the alleged commission by which the defendant's crime is attempted to be justified.

The effrontery of this defence is amazing. It is, as my colleague said, like the apology for a blow inflicted on the king which consisted of an earnest assurance that it was intended for the queen.

The defendant substantially says, "I did not commit piracy, because I was engaged in a higher crime; I did not commit piracy, because I did not try to steal the property of Englishmen or Frenchmen, or Spaniards; I only stole that of American citizens; and I did not do that entirely for my own advantage, but in part that by harassing and impoverishing my loyal countrymen, I might help forward the great conspiracy to destroy the Constitution which their Honors have sworn to support, and which you, gentlemen of the jury, are bound by your oaths to maintain."

He did not commit piracy, because he did not want to injure Englishmen, or Frenchmen, or Spaniards! Did the learned gentleman, (Mr. Wharton), put that argument to you seriously? Did the eloquent gentleman who talked so glibly of the right of secession and of State Sovereignty, and of the defendant's paramount allegiance to the State of Georgia (Mr. Harrison) mean to say, that the defendant and his confederates in this cruel and wicked rebellion, intended no harm to the people of foreign nations? It is not true. Free, republican America, is the promised land of oppressed millions toward which they journey when hope gilds their dreams. The Constitution of the United States is the pillar of fire by night, and the cloud by day, to weary, oppressed, and longing multitudes; it is the miracle of modern times; it stands and will stand, in all history, so far above and beyond any other state paper or document, that it is without peer or parallel, or thing comparative; it is the outgrowth of ages, the pledge of future peace and prosperity to the world, and it was well characterized years ago by our venerable and distinguished townsman, Hon. George M. Dallas, as the fit canopy for a continent. Not want to injure the Englishman, the Frenchman, or the Spaniard! Go to the homes of the poor and oppressed in the British realm, the wide empire of France, or the kingdom of her Catholic Majesty, and you will find the young patriot heart beating at the mention of this far-off land of ours. You will find that America is the land toward which the heart of the young man leaps, and for which the pining old man sighs—not for the fertility or beauty of our land, not for the

grandeur of our lakes and rivers, but for the prosperity, the growing progress and freedom of a multitudinous people made up from the oppressed of all lands and enjoying the blessings of equal laws.

The defendant did not commit piracy, say his counsel, because he was engaged in the work of armed rebellion; he is not a felon, because he was only trying to tear to pieces the Constitution of our country! He was only trying to involve in a state of perpetual war, thirty-four great States; he was only trying to make a line of custom houses, and a system of passports, and a standing army necessary to mark the boundaries of every little principality or great state, kingdom or empire, that mad ambition may carve out of what is now the territory of the United States of America! He was only trying to obliterate the glorious memories and forever dispel the blessed hopes of the American people! Permit me to say here, gentlemen of the jury, that the defence is not competent, or in my judgment one that ought to have been set up in this court. You have been told that the doctrine of secession is a received legal doctrine, and Mr. Rawle's and other speculative and metaphysical essays have been referred to in its support; but I ask my learned brothers to point to a single decision in any American Court in which that doctrine has been held. I throw open to them the law library, the decisions of the entire country, and ask them to bring to your notice one single decision that can guide them or you to that conclusion.

Mr. HARRISON. My argument was that there had been no decision on the subject either way.

Mr. KELLEY. The cases cited by his Honor Judge Cadwalader, in the brief quotation I have made from his opinion in the Parkhill case, abundantly answer that suggestion But let us look for a moment at Mr. Rawle's book. I do not know its history. This may be much to my shame; but I have not found it among the generally recognized expositions of the Constitution. It was written by a very distinguished lawyer, but I apprehend from the hasty glance I have been able to cast over its pages, when he was a young man, and rather for his own gratification as a general essay upon the Constitution, than under the impression that he was preparing a legal argument, or authoritative exposition; but even he shrinks from the conclusion to which, by some extraordinary process, he seems to have come.

"Separation," (said he, in the paragraph following the passage read by my learned brother,) "would produce jealousies and discord, which in time would ripen into mutual hostilities, and while our country would be weakened by internal war, foreign enemies would be encouraged to invade with the flattering prospect of subduing in detail those whom collectively they would dread to encounter."

And again:—"If in other countries, and particularly in Europe, a systematic subversion of the political rights of man shall gradually overpower all rational freedom and endanger all political happiness, the failure of our example should not be held up as a discouragement to the legitimate opposition of the sufferers. If, on the other hand, an emancipated people should seek a model on which to frame their own structure, our Constitution, as permanent in its duration as it is sound and splendid in its principles, should remain to be their guide." *Rawle on the Constitution*, pp. 299, 300.

Seeing how Mr. Rawle recoiled from his own conclusion, let us turn to the Commentaries of that distinguished jurist, Judge Story, upon the Constitution. After alluding to the fact that some of the people of Massachusetts, Virginia, and other States had conceived "queer notions," as the eloquent gentleman, Mr. Harrison, said the other day, he says:

"What, then, is to become of the Constitution, if its powers are thus perpetually to be the subject of debate and controversy? What exposition is to be allowed to be of authority? Is the exposition of one State to be of authority there, and the reverse to be of authority in a neighboring State entertaining an opposite exposition? Then, there would be at no time in the United States the same Constitution in operation over the whole people. Is a power, which is doubted or denied by a single State, to be suspended, either wholly or in that State? Then, the Constitution is practically gone as a uniform system, or indeed as any system at all, at the pleasure of any State. If the power to nullify the Constitution exists in a single State, it may rightfully exercise it at its pleasure. Would not this be a far more dangerous and mischievous power, than a power granted by all the States to the judiciary to construe the Constitution? Would not a tribunal, appointed under the authority of all, be more safe than twenty-four tribunals, acting at their own pleasure, and upon no common principles and co-operation? Suppose Congress should declare war; shall one State have power to suspend it? Suppose Congress should make peace; shall one State have power to involve the whole country in war? Suppose the President and Senate should make a treaty; shall one State declare it a nullity, or subject the whole country to reprisals for refusing to obey it? Yet, if every State may for itself judge of its obligations under the Constitution, it may disobey a particular law or treaty, because it may deem it an unconstitutional exercise of power, although every other State shall concur in a contrary opinion. Suppose Congress should lay a tax upon imports burthensome to a particular State, or for purposes which such State deems unconstitutional, and yet all the other States are in its favor; is the law laying the tax to become a nullity? That would

be to allow one State to withdraw a power from the Union which was given by the people of all the States. That would be to make the general government the servant of twenty-four masters, of different wills and different purposes, and yet bound to obey them all." *Story on the Constitution*, vol. 1, page 353.

Such was the view of Judge Story. It is authoritative, and is so received wherever the Constitution is studied. It would have been the slave of twenty-four masters at the time he wrote, but of thirty four today, and if the people of the United States maintain and defend it, a day will come when he who quotes that passage may insert a hundred for the twenty-four. Your country, and mine, gentlemen of the jury, is alike on the plains of Texas and in the harbor of Charleston, among the enduring rocks that resist the surging billows of the Atlantic, and on the golden sands that hem in the still waters of the Pacific. The Constitution of the United States, the right to establish which was won by the valor and endurance of our fathers, and the wisdom to indite which seems to have been providentially given, makes each State of the Union the country of each one of us, and secures to our posterity the right of citizenship in every future American State; and when the Mississippi valley, drained as it is by more than fifty thousand miles of water course, shall feed and clothe, and house and educate a hundred millions of free people of a single generation, there will be one United States Court into which the people of a hundred States will come to litigate and settle their differences peaceably. The Constitution is the great guarantee of future peace. To maintain it, in its integrity, is to secure the countless millions who shall succeed us in the enjoyment of our rich heritage against such wicked outbreaks as the military and naval power of the country are now suppressing. But if we now fail in loyalty, or falter in duty, the angel of peace may bid the world farewell, till some modern Alexander or Cæsar, accepted by an enfeebled and despairing people, sighing for peace on any terms, may establish a despotism widespread as the limits of our republic.

"Mr. President," (said Daniel Webster,) "if the friends of nullification should be able to propagate their opinions and give them practical effect, they would, in my judgment, prove themselves the most skilful 'architects of ruin,' the most effectual extinguishers of high-raised expectation, the greatest blasters of human hopes, that any age has produced They would stand up to proclaim, in tones which would pierce the ears of half the human race, that the last great experiment of representative government had failed. They would send forth sounds, at the hearing of which the doctrine of the divine right of kings, would feel, even in its grave, a returning sensation of vitality and resuscitation. Millions of eyes, of those who now feed their inherent love of liberty on the success of the American example, would turn away from beholding our dismemberment, and find no place on earth whereon to rest their gratified sight. Amidst the incantations and orgies of nullification, secession, disunion, and revolution, would be celebrated the funeral rites of constitutional and republican liberty." *Webster's Works*, vol. 3, p. 503, 504.

How prophetic were these words. The mere attempt to carry the baneful doctrines into effect, has suspended the arts of peace throughout our country, summoned more than half a million of freemen to the bloody field of civil war, filled the hearts of the people with grief and anxiety, and shrouded their houses in gloom. Nor, mighty and terrible as those results are, do they indicate the full measure of fearful consequences which flow irresistibly from the mere attempt to reduce to practice the insane dogma upon which the counsel have rested the defence of the prisoner. The world is not too wide a field to illustrate the effects of so great a crime. Where are the liberalists of England in the political contests of the day? "The Thunderer" proclaims the end of the great Republic, and the friends of freedom in that land shrink from pressing forward the humane movement which has engaged their hearts and hopes for years Again, the Thunderer proclaims to all Europe that the experiment of democratic republicanism is at an end, and Kossuth and his brave Hungarians accept the fact, and consult as to who shall be king of Hungary. And again, says the Thunderer, the great experiment is at an end; the civil war in America has extinguished the faith of the world in a democracy, and Garibaldi sinks into quietude and gives up the hope of an Italian republic!

I might here, gentlemen of the jury, rest the case, with the single remark that it is no defence to the crime charged in the indictment and proven by the witnesses, to say that the act was perpetrated in furtherance of this grandest of all historic crimes. But respect for the able gentlemen who have managed the defence, requires me to notice some of the minor points they have pressed upon your attention, which I will now proceed to do, as briefly and with as much method as I may, in view of the fact that the continuing progress of the discussion has precluded the possibility of an examination of my notes.

Why, you are asked, convict the defendant, when hundreds of thousands are armed and in the field against you?

The answer is, because it has been proven that he was guilty of one of the most heinous of indictable offences. Did he, when he shipped as a seaman for that voyage, believe that the engagement was for honorable warfare and involved no peculiar risk? Let his confederates answer.

Did you hear, we asked, anything said about Smith, after he left the brig? Yes,

said Rochford, the men were talking about how he felt, and what risk he was running, and so on. Yes, he and every man on board that vessel knew he was running a risk; the risk of his neck; hence it was that they wondered how he felt when absent from her armament and desperate crew

Privateering, it is said, has been recognized by all civilized nations, and I admit it, but the great nations of Europe have recently provided by treaty for its abolition, and our government, though the last to do so, has, I believe, acceded to the proposition. I will not speak of the recent history of the question in this country, as it is somewhat involved in partisan politics, and to discuss it might create the impression that there was some justification for the one act of discourtesy in the course of this trial—the allusion of the gentleman to the party relations of my colleagues and myself. In the highest court of the land, gentlemen, we are considering questions relating to the highest issue that can be confided to man, and no assault shall make me pollute the cause with an allusion to a party question or a party relation. I will even waive the discussion of what the gentlemen appear to deem a point of much importance, lest it might be suspected that my suggestions were intended to vindicate or condemn any party organization with which I or others may have been connected.

Why not, asked the senior counsel, exchange William Smith as a prisoner of war, and send him on his parole, to his sorrowing wife? Because he did not go to his wife when he might have done so without the taint of felony, and because the man in our whole army, most wanting in a soldier's attributes, would be overwhelmed with shame, at the thought that he had obtained his freedom on such terms. "Why not," the changes ring, "exchange this man and his companions, as prisoners of war, as a certain Commodore and others have been exchanged?" In the first place, let me say, that no Commodore has been exchanged; and in the next, that our Government has not sanctioned any exchange of prisoners; and further, that while I admit that the manner of signing, and the letters of the hastily drawn terms of capitulation at Forts Clark and Hatteras, imply the existence of a government known as that of the Confederated American States, I challenge the proof, even through the "Rebellion Record" of any such act on the part of our government, or that it has by any expression or implication, recognized the existence of a foreign government within the limits of the United States.

But, if the Government were prepared to exchange prisoners of war, the defendant would not come within the category. Treat him like a soldier taken on the battle-field! The men who shot the eloquent and gallant Baker a few days ago, were in the open field to contend with armed men. It was soldier meeting soldier, and taking the risk of the contest with no golden vision of prize money on either side. Not so with the defendant and his companions. Numbering a hundred, armed with muskets, boarding pikes, and pistols, with knives concealed in their boot-legs, that it should not be seen how thoroughly they were armed, with a long eighteen pound swivel gun, commanding any point of the horizon, with four heavy waist guns, two eighteen pounders and two twelve pounders, they went to sea, not to meet, but to skulk from armed vessels, and rob unarmed men such as the witnesses we have produced. Not with armed men and vessels of war was the conflict they sought, but with the Enchantress, John Welsh, and such other unarmed, but richly laden merchantmen as they might fall in with. Was this the conduct of soldiers, or felons?

But again, say his counsel, he is not a thief and a pirate, but a prisoner of war, and in support of the proposition, ask, "Did he not give his prisoners a sufficiency of food—and did not the officers of the Albatross confine him more closely, and treat him more harshly than he had treated his prisoners?"

Yes, he did give his prisoners a fair, daily allowance of the water and stores he had stolen from them, and he did not put them in irons, as the United States officers put him, when they arrested him in the act of piracy; but how this proves him to be a prisoner of war, and not a pirate, or why upon this showing, our Government should recognize the Southern confederacy, it is somewhat difficult to tell.

Is not Smith's case, you are also asked, precisely analogous to that of Paul Jones, and are you prepared to say that he should have been hung as a pirate? Let me answer that question so adroitly put, by asking another. Is any one of the counsel for the defence prepared as a lawyer to say, that if before the recognition of our independence, Paul Jones had been taken on board a privateer, by a British cruiser, the English law would not have condemned him as a pirate? The truth is, gentlemen, that Paul Jones, and all the American privateers of that day knew very well, that if they were taken, they would go into England and be tried for the crime of piracy. They took that risk in the cause of their country, and the defendant has assumed it in that of the great rebellion, and it is not for you to shield him from the legal consequences of his deliberate act.

This wicked and groundless rebellion has been compared to the American Revolution, and you are appealed to by the memories of our fathers, to pronounce piracy an act of patriotism, and acquit the defendant. We were in the minority at the time of the Revolution, said my learned brother Harrison. He was mistaken. He has not read history correctly. We were not in the minority; we were the people of the country. Outside of South Carolina, the royalists and tories were

the exceptional few. There is no analogy between this infamous rebellion, and the American Revolution. Had the American people a majority in the British House of Lords at that time? Had they a practical working majority in the House of Commons? Was the highest court of the realm so much in their favor that it had recently given a strained decision securing them the enjoyment of what they regarded as their most sacred right? Or had the king appeared among them, and publicly sworn to fairly administer the laws and protect us in all our rights and privileges? No! no! there is no analogy. We, says he, were weaker in every respect, than are the confederates. In men, money, the munitions, and paraphernalia of war, we were weaker, but in the merits of our cause, we were more than thrice armed. In an effort to maintain justice and right, to extend and perpetuate popular institutions, and to construct a Republic whose ultimate limits should be circumscribed only by those of a continent, and the enduring corner-stone of which, should be human equality, we had a cause that invoked the sympathy, prayers and aid of all good men, and the superintending care of the Eternal Father of men, and fountain of blessing. But who sympathizes with the ambitious and unprincipled demagogues who are drenching the country in blood, in an effort to turn back the hands on the dial of time, and obliterate the precepts and example of their fathers.

But it is said, that this is no mere insurrection or rebellion; that it has assumed the ampler proportions and characteristics of a civil war; that the Southern Confederacy is an existing government, fostering the arts and sciences, administering law, and having its own system of revenue and finance; that foreign nations long since recognized it as a belligerent power, and that its people have been treated as belligerents in our own civil courts; and can it not, you are asked, grant letters of marque? No, gentlemen, if all this be true—and for argument's sake I admit it all—it gives no validity to the letter of Mr. Davis. Letters of marque can only be granted by a member of the family of nations—by a State whose national existence is recognized, and which has, or may have, diplomatic relations. The commerce of the world may not be interfered with by every insurgent chief or rebel leader. Nor does the adoption of a constitution by the rebels or insurgents, however wisely and formally it may be done, invest them with the power. "A revolution," says his Honor, Judge Cadwalader, in the opinion to which I have already referred, "must have been consummated as an act of power, before the question of its rightfulness can be judicially considered."

You, gentlemen of the jury, are judicially considering the question of piracy, and the act of the leaders of a rebellion is set up as a defence. But it has not been and cannot be shown that a revolution has been consummated, and the defence fails. The revolution must have been established; the new government must have maintained itself, been recognized as a member of the family of nations by the original government or those of neutral powers.

Judge CADWALADER. Mr. Kelley, suppose you were to put in the word "peaceably." Are not all the authorities which establish the *de facto* right of a revolutionary government, founded upon its having been for a measurable time peaceably established? Is there any such doctrine, as that there can be an establishment of a revolutionary government which is organized under a contest, while the contest continues?

Judge GRIER. Does it cease to be rebellion in that case?

Judge CADWALADER. The subject is a very interesting one, and very delicate in its application, unless upon that definition; but so far as I can recollect, if the doctrine be defined in that way, it is perhaps a question on which there will be found little or no conflict of authority.

Mr. KELLEY. I think I should have come to meet the suggestion which your Honor has thrown out. "Neither," gentlemen of the jury, says the same opinion, "the power nor the right of revolt against a government, can be asserted in its own courts."

Judge CADWALADER. I did not mean to interrupt you, Mr. Kelley, but to call your attention to the point, that it might be applied to the subject under consideration, because subordinates of all ranks have been protected greatly on the principle of a *de facto* establishment of that which originated in wrong; but the question I suggested was whether that had not always been under circumstances showing that it had, for a time at least, been peaceably established—not merely that the former government had been subverted, but that the new one had been peaceably established; and not where there was a continuing contest.

Mr. KELLEY. His Honor has probably, gentlemen of the jury, made you understand, as he has me, the point he makes, which lay in my mind to be exhibited to you at some stage of my argument

Mr. WHARTON. Allow me to ask how the doctrine would apply to the present kingdom of Italy. Does your Honor mean peaceably established, or peaceably maintained?

Judge CADWALADER. I will endeavor to state it more clearly to the jury if I shall have occasion to do so. I mean to say that a revolutionary government must have been peaceably established, before the question could arise for the purpose now before us. Whether it must be afterwards peaceably maintained, I have not said; but it must first be said to have had a peaceable existence. For example, take the case of the revolutionary government of England between 1648 and 1660. There was a time when there was no other government there, and no other govern-

ment hostile to it. Upon that state of things arose the question which has been so much debated.

Mr. WHARTON. Our government went through a baptism of war; and the present kingdom of Italy has done the same, and yet perhaps it is not peaceably established, for there may be an attempt to overcome it by arms. I desired merely to know whether your Honor meant a peaceable establishment or a peaceable origin.

Judge CADWALADER. Though the origin was hostile, there may have been a peaceable establishment, as occurred in the English revolution. However, I did not mean to interrupt the argument; I merely meant to simplify the question.

Mr. KELLEY. The point that has brought on this discussion—and I thank his Honor for the interruption—is, that the counsel for the prisoner, maintain that the Southern Confederacy exists *de facto*, and that her act is to be accepted as his defence: and I maintain, (and there lies the whole difference between us,) that the United States government exists, and that the two are incompatible, by force of that law which prevents the possible occupation of the same space by two objects at the same time. The United States government extends over the territory of the thirty-four States. If it does not, it has ceased to exist. If it does exist, their proposition is at an end, and no adequate defence to the indictment has been presented.

The government that issues letters of marque must have had a peaceable existence. It must have conquered the original government, or purchased its independence; or so far have exhausted the power of the original government that, for a period of greater or less duration, it should have suspended its belligerent efforts to bring the rebels into subjection. The point may be illustrated by the case of Texas, Mexico and the United States. We recognized the independence of Texas before Mexico, but not until Mexico seemed to have abandoned military effort to repossess herself of the province. The war having ceased in fact, our government recognized the rightfulness of a revolution that had resulted in the peaceful existence of a young State, and with a friendly recognition welcomed Texas into the family of nations While their struggle continued, a Texan letter of marque would not have been a sufficient defence to the charge of piracy in a Mexican court; but after her recognition, and before her admission into the American Union, it would, I apprehend, have been so recognized. But what nation has recognized the Southern Confederacy? None; and is not the proof in this case, that it is forcing all its male inhabitants between sixteen and sixty years of age to do naval or military duty in a war by which its leaders hope to establish a nation and secure recognition? Mr. Davis's letter can, I repeat, have no validity in this Court. But, gentlemen, if I have failed to make this point clear to you, I can leave it with the assurance that their Honors will; and in a case of this magnitude, a jury should take the law from the Court, and not from contending counsel. We who represent the government, are not, as has been intimated, contending for a professional victory. What we desire is an honest and intelligent application of the law to the facts of the case, a conscientious and legal verdict.

Much allowance must be made for the earnestness of gentlemen charged with the defence of a prisoner whose life has been imperilled by his guilty conduct. But there are limits beyond which enthusiasm should not carry a man even in the performance of such a duty. The State of Georgia nor the Southern Confederacy was the Cæsar to whom the prisoner, an American citizen, was bound to render the things that are Cæsar's. Nor was the other assertion of my friend Mr. Wharton, that after the President had issued his Proclamation calling for seventy-five thousand troops to make war upon them, the people of the South thought it but right to resist force by force and began to prepare for war, historically correct. Nearer to the truth was he in fact, though I fear not much in spirit or purpose, when he asked you, and the Court and the audience, the question, who shall say that we are engaged in a war which Congress has declared? No man shall say so, not even the counsel, nor his eloquent colleagues. It was not the Congress of the United States that directed the walls of Fort Sumter to be battered down, and a foreign flag hoisted over their blackened ruins. It was not the voice of Congress that on the 13th of April last proclaimed in the distant city of Montgomery, that the same foreign flag before the first day of the next month would flout the insulted heavens from the dome of our country's capitol. Nor was it Congress that during the entire autumn, winter, and early spring, busied itself in circulating hate-engendering lies, that throughout a large section of the country suspended all peaceful avocations, drained workshop and counting-room, and having from excited and inflamed masses of men, recruited, enlisted, and organized regiments, waged this unholy war. What man shall be found so base as to charge these crimes and this fratricidal strife upon Congress or any department of the government of the United States? When the peace of the country had been violated; its flag dishonored; a little band of its soldiers half-famished and sick at heart from hope deferred, driven from one of its forts by overwhelming numbers, acting without regard to the amenities of civilized war,—its arsenals, hospitals, mints, and other property despoiled, and the very capitol of the country threatened, the President who had sworn to "preserve, protect and defend the Constitution of the United States," summoned the people to arm and aid him in the performance of this great duty. Nor, let me in passing

remark, was it Congress that attempted by the destruction of bridges on the great lines of transit, to prevent the seizure of the Capitol and the overthrow of the Government. What the President did Congress has approved, and more than two hundred thousand American citizens are now voluntarily under arms to suppress the unjustifiable and iniquitous rebellion in aid of which the war has begun, and in defence of the Government and institutions it was intended to overthrow.

The prisoner threw himself into this war in aid of those who so wantonly waged it, not as a belligerent, but as a robber and a pirate: he chose the felon's part, and went to rob his unarmed countrymen upon the high seas. The captures he and his companions made, were not intended to enrich the treasury of the pretended government he professed to serve. His object was to make gain, and put money in his purse. But, says his senior counsel, it will be dangerous to convict him, for if you do, he may be hanged. Well, what then? Not, it is true, an admonition to look out for yourselves, your wives and children; but the declaration that his death will be terribly avenged, that for every man hanged here, there will be ten men hung at the South—that if this prisoner be convicted and executed, there will go up to Heaven from Castle Pinckney a wail that will be heard even on the banks of the Delaware. There has, gentlemen, been much to admire in the course of this trial, and much to surprise him who regards loyalty as a virtue, but the coolness with which these suggestions were submitted to you exceeds all else. One would rather doubt the evidence of his own senses, than believe that he had heard an American jury gravely informed by distinguished counsel, that if they had the temerity to render a conscientious verdict and the law should take its course, their fellow citizens would be hung by the score, and the heart of the nation be wrung by the wail of its suffering children. You have not been sworn, gentlemen, to exercise a sound discretion in the premises: your oath requires you to ascertain the facts, apply the law to them and a true verdict find. Do it—not under the influence of fear or malice or indignation, but calmly and conscientiously; and, if such an administration of the law of the United States shall provoke many and barbarous murders, let it be so! In God's name, let us know the worst. But, if you are to calculate consequences, permit me to ask, what word or fact would carry such inspiration to the armies of the South, or impart so much confidence to the leaders whose Satanic ambition is now agonizing the heart of the nation, as the announcement that in the city where the Constitution was adopted, in the Circuit Court, holden in the shadow of Independence Hall, the Confederacy of Jeff. Davis had been judicially recognized, and its letter of marque, accepted as a defence for the crime of piracy. Better than a brigade, division or whole corps d'armée, would it serve their unholy cause. With what wild shouts of enthusiasm, would they not receive such an assurance that the people of the North sympathize with them in their iniquities, and yearn for peace on such terms as they may graciously condescend to offer.

Again, gentlemen, if the possible consequences of your finding are to influence your deliberations, let me suggest that such a verdict as in my judgment is demanded by the law and the facts of this case, might possibly produce effects much less sanguinary and atrocious than those suggested by the prisoner's counsel. May it not be that among the mercurial people of the South there are some who have been inflamed against the government by the floods of calumny poured upon the heads of the men to whom the people have confided its administration for an executive term, who would be kindly influenced by the fact that one of the guiltiest of their misguided compatriots, taken in the act of a capital crime had been tried with care and deliberation, and properly convicted—but not hurried to the gallows-tree or the lamp-post; not sentenced on the spot to execution, but held as a possible subject for executive clemency. Might not such a fact refute many an infamous lie—bring back to duty some of ambition's misguided victims—save the beautiful locks of some poor girl unable to conceal the love she still bears the dear old flag that waved from the staff on the village green in the days of her childhood; shield from the soothing application of tar and sand the lacerated back of some unhappy man who cannot forget the home of his childhood, or the love of freedom and the Union, inspired by his grandsire's story so often repeated under the shade of the old roof tree; or possibly diminish the number of lawless executions, which by their frequency and cruelty, are inflicting such ineffable disgrace upon the country. Is it not possible, I ask, that some such beneficent consequences as these may follow the conscientious and fearless discharge of your duty.

While the counsel for the government do not wish you to forget that the prisoner has a home, a wife, a child, and an aged grandmother, they are unable to see what these facts, so important to him, have to do with the case. In connection with a plea for mercy, they may be potential, but gentlemen, that blessed attribute does not pertain to your present office. It belongs to the nation, the majesty of whose laws has been outraged, and can be legally exercised by the President alone, and to his consideration you may safely leave it as your duty requires. Other men have wives and children too—and the presumption does not seem to be overstrained that even poor Jacob Garrick, who having been a man when on his native Danish soil, and when in the harbor of Boston, and again, when under his responsibility to the great Searcher of Hearts, he was permitted from yonder witness stand, to tes-

tify to the facts within his knowledge touching the plaintiff's guilt, though he was appraised as merchandise by the pirates who seized him, may also in the course of Nature have had a grandmother—certain it is that he has known a sister's love, for he spoke to you of his brother-in-law.

Yes, Page, and Fifield, and Ackland, the officers and men of the Enchantress, John Welsh and S. J. Waring had wives and children to watch the winds during their absence upon the great deep and pray for their safe return. The rock-bound coast of our country is dotted by the homes of mariners whose hardihood, enterprise and industry bind the nations to peace by the golden bonds of profitable commercial intercourse, and in their behalf we ask that the law as it has existed for ages, may now be firmly administered. For, if it should be announced that a Pennsylvania jury under the charge of the Judges of the Circuit Court of the United States, have held that the prisoner and his lawless comrades were engaged in honorable warfare, and as his counsel will have it, deserve the thanks of their country for their patriotic performance of duty, you will have armed vessels fitting out from every port in the country in which desperate and unprincipled men can be found to prey upon your commerce, and the hearts of the families of your mariners will be torn by agony such as is but too familiar to the wives of our soldiers. What wife of a seaman, mother of a sailor boy, or daughter of a weather-beaten mate or captain will sleep soundly, after she shall have heard that under the solemnity of your oaths you have bid William Smith, the prisoner, God speed, and assured him that in your judgment the officers and crew of the Jeff. Davis deserve well at the hands of your country.

One point more, gentlemen, and the duty of counsel will be ended.

The prisoner's counsel have asked you to judge his case without prejudice In that request we unite most cordially. You entered the box strangers to him, with no opinion as to his guilt or innocence, and, if my colleagues or I have uttered one word outside of the facts or the law of this case by which prejudice might be excited against him, I pray you to banish it from your memory, give full consideration to any fact from which an inference favorable to him can be drawn, and take the law from the Court as it shall give it to you. Let prejudice have no influence in deciding a case so grave in its results, so grand in its relations. But, gentlemen, I do not as my learned friends seem, to recognise love of country—devotion to the beautiful flag that symbolizes its freedom, power and majesty—pride in the glorious memories that fill the pages of its history, or veneration for the brave men who won its freedom, or the wise men who fashioned its institutions as prejudice. I cannot, as they seem, to recognize as prejudice the hopes with which the heart thrills as we contemplate the ever expanding glories of our country—the ever increasing multitude of free people who shall inhabit its broad prairies, its teeming valleys, its rugged mountain sides, and traverse its majestic lakes and rivers—its ever increasing progress in arts, science, letters, morals and religion—the beneficent influence it is to exert in the cause of freedom and social progress among the nations, and the undying perpetuity secured to it by the inspired sages who fashioned the Constitution now so madly assailed. No, these emotions are not prejudice. They are essential elements of patriotism known to you and all true men, and I ask you to carry them with you to the jury room, and allow them full consideration in your deliberations.

Judge GRIER intimated to the Jury that he would charge them now, or to-morrow morning, as they might prefer.

The Jurors preferring to wait till the morning, the Court adjourned.

FRIDAY, *October* 25, 1861.

Judge GRIER proceeded to charge the Jury as follows:

Gentlemen of the Jury, you have listened with patience for three days to the evidence and argument in this case; and it now becomes your duty, after a few remarks from the Court, to make up your verdict. It is unnecessary, to gentlemen of your understanding, to repeat the common places about your duty of giving a fair and impartial trial, without prejudice, &c. You are all aware of your duty.

The defendant, William Smith, whom you have in charge, is indicted for the crime of piracy. It is proper that the Court should give you a definition of it, so that you may apply the testimony to the case. It is briefly defined "as robbery on the high sea." (5 Wheaton, 153.) As the sea belongs to no nation, but to all nations, and as the offence is usually committed without the particular municipal jurisdiction of any nation, it is an offence against the law of nations, and may be punished by any nation, whether committed by natives or foreigners. Pirates or robbers on the ocean are called *hostes humani generis*. But every nation has the offence and the punishment defined by its own municipal laws.

Of the several acts of Congress on this subject, we need only refer to the Third Section of the Act of the 15th of May, 1820, as the one which defines the offence as charged in the indictment. It is as follows:

"If any person shall, upon the high seas, or in any open roadstead, or in any haven, basin, or bay, or in any river where the sea ebbs and flows, commit the crime of

robbery, in or upon any ship or vessel, or upon any of the ship's company of any ship or vessel, or the lading thereof, such person shall be adjudged to be a pirate, and being thereof convicted before the Circuit Court of the United States for the District into which he shall be brought, or in which he shall be found, shall suffer death."

First. The offence is robbery—a crime defined by the common law as "the felonious and violent taking of any money or goods from the person of another, putting him in fear."

The epithet "felonious" has reference to the intention, which must be "*animo furandi*," for the purpose of stealing or appropriating the thing taken.

Second. There need not be absolute personal violence used, if there be threats and the person robbed, submits peaceably, through fear of violence. When the robbery is committed by several acting together, all are equally guilty. Nor need the money or goods taken be *on* the *person*, provided they be in the possession of the owner, such as household goods or, cattle in the field, or, as in this case, "upon a vessel and its lading," as defined in the act.

Third. The robbery must be committed on the "high seas," &c.

If you believe the testimony, (which I need not repeat to you,) the charge as thus defined, appears to be fully established. In fact, if the case rested here, the learned counsel of the defendant seem to admit that they could not resist a conviction.

But it is contended that, though property may be taken "by violence on the high seas," yet if it be done by authority of a State in prosecution of a war against another State, the persons acting under such authority are not guilty of piracy, and cannot be punished as such. This is no doubt true, for piracy has been defined "as depredation on or near the sea without authority from any Prince or State." (6 Bacon's Abridgment, 163.)

Those having such authority are treated as enemies, or as having the privileges of enemies in open war. Thus, Turks and Algerines, though acting as freebooters on the ocean, could not according to Sir Leoline Jenkins, be treated as pirates, because they acted under a commission from *States* with whom the Government had treaties, and had acknowledged to be States in the great family of nations. But it does not follow that every band of conspirators who may combine together for the purpose of rebellion or revolution, or overturning the government or nation of which they were citizens or subjects, become *ipso facto*, a separate and independent member of the great family of sovereign States.

A successful rebellion may be termed a revolution; but until it has become such, it has no claim to be recognized as a member of the family, or exercise the rights or enjoy the privileges consequent on sovereignity. "When a civil war rages in a foreign nation, or in our own, and one part separates from the old established government, and erects itself into a distinct government, the Courts of the United States must view such newly constituted government as it is viewed by the legislative and executive departments of the government of the United States." Every government is bound, by the law of self-preservation, to suppress insurrections; and the fact that the number and power of the insurgents may be so great as to carry on a civil war against their legitimate sovereign, will not entitle them to be considered a State. The fact that a civil war exists for the purpose of suppressing a rebellion, is conclusive evidence that the Government of the United States, refuses to acknowledge their right to be considered as such. Consequently, this Court sitting here to execute the laws of the United States, can view those in rebellion against them in no other light than traitors to their country, and those who assume by their authority a right to plunder the property of our citizens on the high seas, as pirates and robbers.

I do not think it necessary on the present occasion, to follow the wide range of questions which have been drawn into the discussion of this case by counsel, or to refute the sophisms and platitudes put forth by speculating theorists or political demagogues on the constitutional right of any portion of this one nation, or of any of the States composing it, to destroy the Constitution and Union because they are displeased at the result of an election. The right to secede is not to be found in the Constitution, either in its letter or its spirit. If so, it would be *felo de se*. It is a Government and Constitution ordained by the people of the whole United States for all time—not a mere temporary compact of independent and sovereign confederates.

Judge the tree by its fruits, and we see the results of this miserable political heresy in the present situation of our country, (we need not go to Mexico,) with more than half a million of men in arms drenching our fields in blood.

This fratricidal war is not only the fruit of this doctrine, but the demonstration of its iniquity. What are our mighty armies arrayed for, but to compel, by force of arms, its acknowledgment, by those whom

reason cannot convince of its absurdity. Why prate about the right of an oppressed people to change their government by a revolution? Can that justify the treason and rebellion of those who were never oppressed, but who seek to substitute a military tyranny for the purpose of conquest and oppression?

Of the plea of duress, I need only say that I am sorry indeed that there is not some evidence to support it; for I should grieve to see these poor fellows, who have been led astray by wicked demagogues, become the scape goats for the greater iniquity of others. But the dispensation of mercy is not with us. Your duty is to render a true verdict, and that of the Court to pronounce the sentence of the law thereon. Whether under all the circumstances of the case, a proper policy might not suspend its execution, is a question for the Executive to decide.

Certain points have been presented to the Court on which we are requested to instruct the jury. My opinion of them may be inferred from what I have already said; but I have requested my learned brother to notice them more particularly in his remarks to the jury, which he will now proceed to do.

Judge Cadwalader. Gentlemen of the Jury, independently of the request of the presiding Judge, this case, from its general importance and specific novelty, might require that the views of each member of the Court on the questions involved should be stated.

One of the witnesses examined on the part of the defence has deposed that in June last, the defendant shipped as one of the crew of an armed vessel called the Jeff. Davis, fitted out as a hostile cruiser against the United States. The defendant's counsel allege, and it is perhaps admitted by the counsel for the prosecution, that she was a privateer, commissioned under letters of marque and reprisal from the so called Confederate States. The defendant appears to have resided at Savannah, Georgia, where he had followed the business of a branch pilot, and had been a person of good repute. He is entitled here to the benefit of this former good character, and also to that of the testimony which proves the kind treatment by the crew of the Jeff. Davis of their prisoners, while he was on board and afterwards. The same witness has testified that the defendant was a boatswain in this vessel; that he left Savannah for the purpose of joining her in the early part of June last; that he joined her at Charleston, South Carolina, where she then lay, and that he went to sea in her on the 28th of that month from Charleston.

The character and strength of her armament has been described by several witnesses; and some occurrences prior to those particularly charged in the indictment have been proved in order to show that she was cruising for the purpose of capturing merchant vessels of the United States. On the 6th of July last, according to the testimony, (of which you, of course, are the judges,) she captured the schooner Enchantress, a vessel owned by citizens of the United States, laden with a cargo which was also the property of citizens of the United States. The facts proved, in order to show that the Enchantress and her cargo were forcibly taken and forcibly detained by her captors, are doubtless fresh in the recollection of the jury. The defendant, as prize master, with four others, was, according to the testimony placed in charge of her. The place of capture, as one of the witnesses deposed, was about two hundred and fifty miles southeast of Nantucket South Shoal. The Enchantress, in charge of the prize crew, and according to the evidence under the command of the defendant, appears to have borne away to the southward, and after having been at sea till the 22d of July, to have been on that day recaptured off the coast of Carolina by a national armed vessel of the United States. This recapturing vessel was a steamer which took her in tow and brought her into Hampton Roads. The defendant and the others of the prize crew were kept as prisoners on board of this war steamer, which, after anchoring in Hampton Roads, near to Fortress Monroe, went a short distance up the Potomac, returned, and again anchored in Hampton Roads; after which she brought the prisoners, including the defendant, to Philadelphia, where they were taken into the Marshal's custody.

This, I believe, is an outline of the whole of the proofs. I have taken full notes of the evidence with great care, and will read the whole, or any parts of it, to the jury, if any one of them, or any of the counsel, request me to do so.

The counsel for the prosecution contend that those who participated in the capture of the Enchantress and her cargo, were guilty of piracy under the act of Congress of 15th of May, 1820, which enacts that any person committing upon the high sea the crime of robbery in or upon any ship or vessel, or upon any of the ship's company of any ship or vessel, or the lading thereof, shall be adjudged a pirate. The offence thus described in this act is, in the several counts of the indictment, stated in

different specific or particular forms, in order to meet alternative aspects in which the case might be presented by the evidence. The indictment also contains an averment showing that the case is within the jurisdiction of the Court under the enactment that the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular State, shall be in the district where the offender is apprehended, or into which he may first be brought.

One of the points of law on which the counsel for the defendant have requested instructions to the jury, is, that this Court has no jurisdiction of the case, because, "after his apprehension on the high seas," he "was first brought into another district," —meaning the Eastern District of Virginia, —"and ought to have been there tried." This instruction cannot be given. When he was taken prisoner, and was detained in the recapturing vessel, he was not apprehended for trial within the meaning of the Act of Congress. His first apprehension for this purpose, of which there is any evidence, was at Philadelphia, after his arrival in this district. Whether he had been previously brought into another district, within the meaning of the Act, is unimportant. It has been decided that, under this law, a person first brought into one district and afterwards apprehended in another, may be tried in the latter district. Therefore, if you believe the testimony on the subject, this Court has jurisdiction of the case.

Upon the main question of the guilt of the prisoner, there is, I believe, no dispute that the case would be within the words and meaning of the Act of Congress, if the revolutionary proceedings whose character and effect have been discussed, had not occurred, and had not resulted in a civil war. An established government may prosecute hostilities against its enemies in a civil war in like modes as against its foreign enemies in a national war, and for certain purposes, with like effects. For example, vessels captured in the present civil war may be confiscable in prize courts of the United States, and captured persons may be detained by the United States as prisoners of war. Moreover, in all wars, national as well as intestine, innocent and harmless inhabitants of hostile districts, may, in common with authors and abettors of the war, become involved in its calamities. These results when produced by a civil war, do not alter its legal character. They do not convert it into a foreign or a national war. In a civil war—however organized and systematic the hostilities prosecuted by an established government—its enemies, may, when captured, be liable as traitors or as pirates, to prosecution in its Courts of justice. I have recently had occasion to say, and I now wish to repeat, that during civil wars, in which organized hostilities are prosecuted on an extended scale, persons in arms against an established Government, captured by its naval or military forces, are often treated, not as traitors or pirates, but according to those humane modern usages which are observed as to public enemies in a national war. They are detained as prisoners of war until exchanged or discharged on parole; or, if surrendered to the civil authorities for trial, are, after conviction, respited or pardoned. Hostile feelings have thus been softened, and measures of retaliation, endangering a revival of obsolete systems of barbarous warfare, have been prevented. But some writers on public law have discussed the subject, as if such civilized modern usages were founded in rules of legal right, rather than in considerations of mere policy. I therefore think it my duty to state that such usages, however commendable, are not, in a civil war, founded in any rules of absolute legal right, but are measures of governmental policy. The question of their observance depends upon the decision of the legislative or executive departments of the Government, not upon the opinions of its judicial organs. Thus, Courts and Juries have, with such questions no proper concern, certainly none that should influence the finding of a verdict. The jury who find a defendant guilty, may, indeed, recommend him to mercy. But such a recommendation, though always respectfully considered, is, in law, no part of the verdict itself. In finding the verdict, the rules of law should be applied with calmness and firmness, without admitting any qualification of them from extrinsic reasons. If there is any rational doubt of the defendant's legal guilt, the jury should acquit him; otherwise, he should be convicted.

In the arguments of the counsel on both sides, the general question of the lawfulness of privateering, as a method of naval warfare, has been debated. In a national war between independent States, privateering is at present lawful except where it has been abolished by treaty. In such a war a commissioned privateer is to be treated as a part of the belligerent naval forces of the Government which has granted the commission. This heretofore established rule of the law of nations, cannot, so far as the United States may be concerned, be changed otherwise than by Act of Congress, or by treaty with foreign governments. No law of Congress to this effect has been enacted; no such treaty is in force; and, therefore, neither the Executive nor the Judicial

organs of our Government can, at present, rightfully condemn the practice of privateering.

But these remarks apply only to privateering in legitimate war, in which the commissioning government is that of an independent State. The commission of a revolutionary government, whose existence is not recognized by that of the United States, can confer no such authority as will change the legal character of piracy, by merely giving to it the name and form of privateering.

Of the propositions of law upon which the defendant's counsel have requested instructions to the jury, only one has been as yet particularly answered. The others involve the question whether the hostile revolutionary government may not have been so organized and established, in fact, if not of right, as to exempt a resident under its actual dominion from criminal responsibility for acts of submission or allegiance to it, though they may have included a hostile breach of his duty of allegiance to the United States. The question in another form is, whether the duty of allegiance may not have been so suspended there, as to relieve him of it to the extent required for the purpose of exemption from the guilt imputed in this indictment.

The law might be as the counsel have stated it, if either of two additional statements could be made: First, if the government of the United States had been superseded by a local government, which, though it had originated in a hostile revolution, had, for a definite subsequent period, been established and maintained in peace; or, secondly, if the defendant, though such a government had not been thus peaceably established and maintained, had been impressed into the hostile service of the revolutionary government, and compulsorily detained in such service. As to the first of these two points, the difficulty in the way of the defence is, that the Government of the United States has not been subverted, and that its authority in the hostile districts, if suspended, or at present superseded, is not superseded by that of a government which has at any time been peaceably established, much less by one which has been maintained in peace. The government of the States now confederated for purposes hostile to the Constitutional Union, was not organized without a cotemporaneous outbreak of civil war. This war has been continued without interruption. The contest has been on their part a war against an established government, to which they owe allegiance. So long as this government exists, and the contest is maintained, the peaceable establishment of the revolutionary government cannot be asserted.

As to the other point—I mean the question of compulsion—the defence has not been sufficiently made out in law. The mere fact, if it were proved, that by an act of legislation of the revolutionary government, under whose power the defendant resided, military or naval service was required of every such resident, under pain of banishment, or confiscation of property, would be no justification or excuse. Unless actual force was exercised against him personally, or threats and intimidation placed him personally under a reasonable fear of death or serious bodily harm, the allegation of compulsion cannot be sustained. If he was, at first, impressed forcibly into the hostile service, the inference might be that his detention in it was afterwards compulsory, so long as he remained on board the armed vessel in which he was a subordinate. But any such favorable inference would, even in that case, be rebutted by the proof that, as prizemaster, he afterwards remained in the hostile service when he was no longer a subordinate. The consideration of this point is, however, not necessary, because there is no sufficient proof that he did not at first engage voluntarily in the hostile service.

The propositions of law stated by the defendant's counsel must, for these reasons, be answered negatively.

The Jury retired, and after an absence of three-quarters of an hour, returned and rendered a verdict of GUILTY.

Mr. Harrison intimated that the defence would file reasons for a new trial hereafter.

On the 28th of October, the counsel for the prisoner moved for a new trial, and in arrest of judgment, and filed the following reasons therefor, to be argued hereafter:

1. Because the Court answered in the negative and overruled the six several points of law presented on the trial of this cause to the learned Judges for their opinion and instruction thereon to the jury.

2. Because the Court should have affirmed, severally, the said six points of law presented as aforesaid, and should have charged that the same severally were correct and sound in law.

3. Because one of the learned Judges charged the jury "that the existence of the present civil war for the purpose of suppressing a rebellion," was conclusive evidence that the so-called Southern Confederacy was not an existing State, acknow-

ledged by the United States, and consequently that the Court could view the defendant only as a pirate and a robber.

4. Because one of the learned Judges charged that in order to render the doctrine or points of law relied on by the defendant's counsel applicable or correct, it was necessary that the so-called Southern Confederacy should have been, or be established and maintained in peace for a definite period subsequent to the hostile revolution in which it had or ginated, which the said Judge charged was not the case.

5. Because the Court charged that there was no evidence of any duress which in law would exonerate the defendant from the offence laid in the indictment.

6. Because any length of time longer than is actually consumed in enabling a government to exercise exclusive jurisdiction and control over the people within its territorial limits, is not necessary, by the law of nations, to constitute the same a government *de facto*, and that it matters not whether the establishment of such a government be brought about or maintained by force of arms or otherwise.

7. Because the commission under which the defendant acted, exonerated him from the crime of piracy with which he stood charged.

8. Because the defendant was not first brought into this District, but, on the contrary, into the Eastern District of Virginia.

9. Because the defendant was not first apprehended in the Eastern District of Pennsylvania.

10. Because, if the defendant, in doing the act wherewith he is charged, acted in good faith, under a commission which he supposed to be valid, he ought to have been acquitted.

11. Because the verdict is against the law.

12. Because the verdict is against the evidence.

In arrest of judgment: Because the indictment avers that the defendant was first brought into this District, and was apprehended here.

On the 28th of October, THOMAS QUIGLEY, EDWARD ROCHFORD, and DANIEL MULLINZS, of the crew of the Jeff Davis, were arraigned on the charge of Piracy, and pleaded "Not Guilty." A Jury was empannelled, and the trial continued till 6 o'clock the next day, when they were found "GUILTY."

On the 29th of October, the case of EBEN LANE, the only remaining prisoner of the crew of the Jeff Davis, was submitted to the Jury without any evidence on the part of the government, and he was found "NOT GUILTY." It was alleged that Lane who had charge of steering the Enchantress, as one of the prize crew, steered south in day time and north by night, when he was not observed, thereby keeping her longer on the ocean, and conducing to her capture.